STATE AID TO BANKS

An analysis of the Commission's decisional practice

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Staatssteun aan banken

Een analyse van de beschikkingspraktijk van de Commissie

State aid to banks

An analysis of the Commission's decisional practice

Proefschrift

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Preface

On 26 January 2018, Randolf van Lambalgen was awarded a PhD by the Erasmus University Rotterdam for his thesis 'State aid to banks – an analysis of the Commission's decisional practice'. His supervisors were professor Hélène Vletter-van Dort and professor Kleis Broekhuizen.

Van Lambalgen has written an inspiring dissertation about State aid to banks. As the subtitle of the dissertation indicates, Van Lambalgen has focused on the decisional practice of the Commission. This is not without reason: the European Commission plays a central role in State aid cases. Indeed, every State aid measure has to be authorised by the Commission before it can be implemented by the Member State. In the case of State aid to banks, the authorisation by the Commission is usually conditional upon the submission of a restructuring plan. This restructuring plan has to include restructuring measures (such as divestments, pricing restrictions and an acquisition ban). These restructuring measures are "tailor-made" and thus different per case. Indeed, banks are different and State aid measures are different; consequently, the restructuring measures are also different in each case. This explains why in certain cases far-reaching restructuring measures are imposed, whilst in other cases a much more lenient approach is taken. However, as Van Lambalgen correctly argues, a tailor-made approach should not result in an arbitrary approach.

As Van Lambalgen sets out in chapter 6, it is not easy to establish whether the differences in restructuring measures are justified by the differences between the various bank State aid cases. In that regard, Van Lambalgen observes that there is a lack of clarity as to whether the bank State aid decisions of the Commission are in line with the principle of equal treatment. This observation has led to the following research question: How to assess whether a bank State aid decision complies with the principle of equal treatment?

In his dissertation, Van Lambalgen provides an answer to this question. He does so by introducing the 'relevant characteristics-approach'. This is a novel approach and it constitutes the most innovative aspect of his dissertation. In essence, the 'relevant-characteristics approach' entails that the Commission should consistently take into account the "relevant characteristics" (i.e. the characteristics that are relevant to the Commission's assessment). In order to find these relevant characteristics, Van Lambalgen has analysed the hundreds of bank State aid decisions that were taken since the start of the financial crisis in 2007. The resulting list of relevant characteristics has led to a framework of analysis. Analysing a bank State aid case through the application of this framework of analysis ensures a consistent approach which takes all relevant aspects into account. The framework can be used by every actor in a bank State aid case, such as governments that consider granting State aid to banks, beneficiary banks, or the Commission itself. The 'relevant characteristics-approach' enables them to assess the consistency of the Commission's decisional practice.

It is with great pleasure that we introduce this dissertation in the Series of the Institute for Corporate Law of the University of Groningen and the Erasmus University Rotterdam (*Serie vanwege het Instituut voor Ondernemingsrecht van de Rijksuniversiteit Groningen en de Erasmus Universiteit Rotterdam*).

Contents

List of abbreviations

AG	Advocate General
AMC	Asset Management Company
APS	Asset Protection Scheme
ARR	Awesome Research Room
BRRD	Bank Recovery and Resolution Directive
CEE	Central and Eastern Europe
CEE-R	Central and Eastern Europe and Russia
CJEU	Court of Justice of the European Union
CoCo	Contingent Convertible
CRD	Capital Requirements Directive
CRR	Capital Requirements Regulation
DGS	Deposit Guarantee Scheme
DRI	Direct Recapitalisation Instrument
EBA	European Banking Authority
ECB	European Central Bank
EEA	European Economic Area
EEC	European Economic Community
EC	European Community
EFTA	European Free Trade Association
ESM	European Stability Mechanism
EU	European Union
FSB	Financial Stability Board
GBER	General Block Exemption Regulation
IAC	Impaired Assets Communication
IGA	Intergovernmental agreement
LME	Liability Management Exercise
MEOP	Market Economy Operator Principle
MoU	Memorandum of Understanding
MPE	Multiple Point of Entry
MREL	Minimum Requirement for own funds and Eligible Liabilities
NAMA	National Asset Management Agency
NCA	National Competent Authority
NPL	Non-performing loan
NRA	National Resolution Authority
PIP	Private Investor Principle
PIT	Private Investor Test
PSI	Private Sector Involvement

R&R-guidelines	Rescue and Restructuring guidelines
REV	Real Economic Value
RWA	Risk-weighted assets
SAAP	State Aid Action Plan
SAM	State Aid Modernisation
SGEI	Service of General Economic Interest
SLE	Subordinated Liability Exercise
SME	Small and Medium-sized Enterprises
SPE	Single Point of Entry
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TLAC	Total Loss Absorbing Capacity

Chapter 1. Introduction

1.1 Background and illustration of the subject-matter

"The Dutch lobby in Brussels should have been better."[1]
"The restructuring measures imposed on ING are punishments."[2]
"ING accuses the Commission that it has treated the banks unequally."[3]

These newspaper headlines all relate to the decision of the European Commission regarding the State aid that was granted by the Dutch state to the Dutch bank ING. During the financial crisis, ING (like many other banks and financial institutions) experienced financial difficulties, and it had to be 'rescued' by the Dutch state. The Dutch state undertook several measures to help ING survive the crisis. These measures constituted *State aid*.

In principle, EU law prohibits State aid, because State aid may give rise to competition concerns. Distortions of competition can occur in three ways. Firstly, State aid may give the beneficiary banks an unfair competitive advantage over other banks which did not get State aid. Secondly, State aid may lead to subsidy races between member states. If one member state is granting excessive aid to its banks, then other member states may follow and also give excessive aid to their banks. Thirdly, if a Member State recapitalises banks which do otherwise not have access to capital (and would subsequently have to leave the market), then State aid can frustrate the normal market functioning. Besides these competition concerns, there is also the concern of moral hazard. If banks know or expect that they will be rescued, then they are more inclined to take (excessive) risks. They enjoy the upside, but do not bear the downside risk of their actions. Thus, moral hazard may lead to excessive risk-taking.

So it comes as no surprise that State aid is prohibited in EU law. This prohibition is laid down in Article 107, paragraph 1, of the Treaty on the Functioning of the European Union (TFEU). However, there are a few exceptions to this

1. "Nederland zou in Europa wat meer handjes moeten schudden", NRC Handelsblad, 26 May 2012.
2. "Halvering ING is strafmaatregel", NRC Handelsblad, 25 January 2010.
3. "ING verwijt Kroes banken ongelijk te behandelen", Het Financieele Dagblad, 9 January 2010.

prohibition (Article 107, paragraphs 2 and 3, TFEU). For instance, State aid may be justified when it is intended to remedy market failure. In the case of State aid to the banks, the aid was deemed necessary to prevent a meltdown of the financial system. Therefore, a balance must be struck between preserving competition on the one hand and preserving financial stability on the other hand. This is the task of the European Commission, who is the only competent authority to judge the aid measures. The Commission has sought to achieve this balance by approving the aid measures (to preserve financial stability), and by imposing restructuring measures on the beneficiary banks at the same time (to compensate for the competition distortions).[4] Those restructuring measures can be very severe, and are sometimes perceived (by the banks) as punishment.[5]

In the case of ING, the Commission approved the aid measures, but it imposed certain conditions on ING: ING had to divest 45% of its assets (i.e. its insurance branch, its subsidiary ING Direct USA, and other entities). Furthermore, ING was prohibited from acting as price leader. And finally, ING had to adhere to an acquisition ban for 3 years.

It is clear that those restructuring measures are very severe. ING has conducted legal proceedings against the European Commission arguing that it was not treated fairly. Other banks have also been granted State aid, but they were not imposed such strict conditions. Also in the literature, it is argued that ING was treated harshly, especially when compared to other banks. This raises the question of *equal treatment*.[6]

At this point, an important clarification should be made. The ING-case just serves as an illustration of a more general issue: can it be established whether the Commission has applied the principle of equal treatment in its State aid control policy. Since the ING-case is a well-known example in the Netherlands, it was a logical choice to illustrate my point using the ING-case. However, I could have easily used another bank. ING was not the only bank that felt treated unjustly. Some other banks also faced restructuring measures that they felt were too severe.

4. In one of its decisions (ING, 16 November 2012, para. 170), the Commission underlined that "when it approves a measure, it does so on the basis of any accompanying commitments which form an integral part of the measure in question".
5. Also in the literature, the term 'punish(ment)' has been used. For instance, Soltész & Von Köckritz (2010, p. 302) remark that the Commission "punishes banks which received 'too much' or 'too cheap' aid".
6. In its 2009 Annual Report (p. 7), ING argued the following: "We accepted these far-reaching terms on the assumption that the EC would treat all state-supported financial institutions equally and safeguard the level playing field in the EU internal market. However, following the announcements of restructuring agreements the EC has entered into with other state-supported financial institutions, we have strong concerns that the level playing field in the EU internal market is at risk."

Thus, on a more general level, the following observation can be made: some banks appear to have 'escaped' easily, while ING and other banks faced severe restructuring measures. This raises the question of *equal treatment*. Similar concerns were raised in a task force report of the Centre for European Policy Studies:

> *"It should thus come as no surprise that some states felt unjustly treated, leading to criticism of arbitrariness and inflexibility in the decisions."*[7]

In the literature, the following observation was made:

> "Thus a tension surfaced over time between, on the one hand, the need for a case-by-case assessment of the viability of credit institutions and of *the requirement of equal treatment*. Put otherwise, the principle of proportionality sometimes required derogations to (or a *differentiated* implementation of) stated principles but the *lack of clarity as to the circumstances* justifying these derogations raised *concerns of discrimination*."[8]

This observation touches upon a crucial problem: there is a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment. In my opinion, this lack of clarity is problematic, as will be discussed in the following section.

1.2 Description of the problem

The previous section illustrated that there is some doubt whether the principle of equal treatment is respected by the Commission in its bank State aid decisions. This doubt is caused by a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment.

This lack of clarity is due to the fact that it cannot easily be established whether a bank State aid decision complies with the principle of equal treatment. This principle essentially requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[9] It goes without saying that bank State aid cases are not identical; the outcomes of the State aid procedure are therefore also not identical. In fact, State aid cases are often not comparable. This is because the Commission follows a "tailor-made approach": the Commission

7. Sutton, Lannoo & Napoli 2010, p. 20.
8. Gerard 2013, p. 18.
9. Case T-319/11, para. 110.

takes into account the specific circumstances of each case.[10] Taking into account all the specific circumstances of the cases inevitably means that there will be many aspects on which State aid cases can differ from each other. This, in turn, means that it cannot easily be established whether a bank State aid decision is in line with the principle of equal treatment. This is what results in a lack of clarity.

Because of the lack of clarity, banks that are confronted with severe restructuring measures may easily have the feeling that the imposition of those restructuring measures is unfair, (especially) when compared with other banks that were confronted with less severe restructuring measures. Those less severe restructuring measures are due to differences between the bank State aid cases, but if it is not clear which differences are relevant, then this lack of clarity may easily lead to a feeling of unfair or unequal treatment.

The lack of clarity may thus lead to doubts whether the principle of equal treatment is respected by the Commission in its bank State aid decisions. Since the principle of equal treatment is a general principle of European Union law, the Commission is bound to respect the principle of equal treatment. Doubts about the application of the principle of equal treatment may undermine the public support for the Commission's State aid control policy. The lack of clarity is therefore problematic for the Commission.

The lack of clarity is also problematic for the banks and Member States. In the first place, this lack of clarity may lead to uncertainty for Member States that are about to grant State aid to banks. Because of the "tailor-made approach" of the Commission and the resulting lack of clarity, Member States and beneficiary banks do not always know what to expect from the Commission in terms of the required restructuring measures. Furthermore, the restructuring measures that the Commission demands may be hard to challenge because of this lack of clarity. Beneficiary banks and Member States may have the feeling that they are unfairly treated in comparison with other bank State aid cases, but because of the lack of clarity, they are not able to assess if this feeling is correct. This is problematic, because if they are not able to assess if the restructuring measures (that the Commission demands from them) are in line with the principle of equal treatment, then they cannot successfully argue (during the negotiations with the Commission) that these measures should be less severe. In addition, they cannot make a well-considered decision whether to challenge the Commission decision before the Court of Justice.

10. For instance, in the 2013 Banking Communication (point 9), the Commission stresses that in its assessment of banks' restructuring plans, it will take account of the specificities of each institution and Member State.

The main problem that this PhD-study aims to tackle, can thus be formulated as follows:

> ***There is a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment. This lack of clarity may result in a feeling of being treated unfairly in comparison with other banks that have received State aid.***

1.3 The aim of the study

1.3.1 Research question

The aim of this PhD-study is to address the central problem that was identified in the previous section. How to clarify the applicability and application of the principle of equal treatment to bank State aid cases? The purpose of this PhD-study is to find a way in which it can be assessed whether a bank State aid decision complies with the principle of equal treatment. The corresponding central research question is thus as follows:

> ***How to assess whether a bank State aid decision complies with the principle of equal treatment?***

1.3.2 Relevance of the research

It has to be stressed that the main purpose of this PhD-study is not to reach any conclusions on whether or not the Commission has respected the principle of equal treatment in the past. In section 1.1, it was mentioned that there were some suspicions that the Commission had violated the principle of equal treatment. Although it might be tempting to find out whether these suspicions were correct, that is not the ultimate aim of this PhD-study. The aim of this PhD-study is not backward-looking; rather, it is forward-looking. It is about providing a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This framework can be put to use by the Commission, the Member States as well as by beneficiary banks.

Relevance to Member States and banks

First and foremost, this PhD-study is relevant for the Member States that consider granting State aid and for the beneficiary banks. Every Member State that grants State aid and every bank that receives State aid, is ultimately confronted with a decision of the Commission. If a Member State or a beneficiary bank has the feeling that it was unjustly treated by the Commission in comparison with the way other banks were treated, then it probably wants to be able to substantiate this feeling. This PhD-study enables Member States and beneficiary banks to assess whether this feeling is correct. This PhD-study provides a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This framework is not only useful for challenging the restructuring measures. Indeed, it can be used to *anticipate* the "treatment", to *negotiate* the "treatment" and to *challenge* the "treatment".[11]

These three possible uses correspond to three different stages. The first stage is when a Member State designs the aid measure. The second stage is when the Member State and the beneficiary bank conduct negotiations with the Commission on the aid measure and the restructuring plan. The third stage is when the Commission has adopted a decision and when the Member State and beneficiary bank have to decide whether or not to challenge that decision before the Court of Justice of the European Union (CJEU).[12]

With respect to this third stage, Member States and beneficiary banks could use the framework of this PhD-study to estimate whether they can successfully challenge the decision before the CJEU by pleading a violation of the principle of equal treatment. Since the case-law from the CJEU usually receives more attention than decisions from the Commission, one could think that the third phase (the litigation-phase) is the phase in which the framework of this PhD-study can be best put to use. However, in my opinion, this is not the case. There are 90 bank State aid cases, and only in 15 cases, the Commission decision was challenged before the CJEU.[13] There are thus relatively few Member States and banks who challenged the Commission decision before the CJEU by bringing an action for annulment.

An important hurdle is the burden of proof: the applicant has to prove that the Commission did not respect the principle of equal treatment. Another – even more serious – obstacle is that the principle of equal treatment is interpreted very narrowly by the CJEU.[14] In my opinion, the narrow CJEU-definition[15] of the principle of equal treatment can be unsatisfactory, because the feeling that one is treated unfairly in comparison with others might be broader than the principle of equal treatment as defined by the CJEU. In other words: while the CJEU might conclude that the principle of equal treatment was not violated, the bank concerned may still have the feeling that it was treated

11. The "treatment" being the total package of restructuring measures that the Commission requires from the beneficiary bank.
12. In this PhD-study, I will mainly use the term 'CJEU'. However, for the sake of readability, I will sometimes speak of 'the Court of Justice' or simply 'the Court'.
13. As will be explained in section 5.19.
14. This will be explained in-depth in chapter 5 of this PhD-study.
15. In this PhD-study, I use the term 'CJEU-definition' to refer to the way how the principle of equal treatment is defined, interpreted and applied by the CJEU.

unfairly in comparison with other banks. Since this PhD-study aims to address that feeling – or more precisely: to address the lack of clarity that has caused that feeling – this PhD-study will not focus solely on the CJEU-definition of the principle of equal treatment. Instead, other interpretations of the principle of equal treatment will also be explored. As will be explained in chapter 6, it is possible that while there is no violation of the principle of equal treatment according to the CJEU-definition, there is a violation according to another definition/interpretation. While that other interpretation cannot be used to raise a plea regarding a violation of the principle of equal treatment, it might be able to be used to substantiate other pleas of law. Furthermore, the other interpretation is very useful in the negotiations with the Commission. As was explained in the previous section, doubts about the application of the principle of equal treatment by the Commission might undermine the public support for its State aid control. Since these doubts are not limited to the CJEU-definition of the principle of equal treatment, the Commission's concern for the public support is probably also not limited to the CJEU-definition of the principle of equal treatment.

Indeed, it is during the negotiation stage that the framework is most relevant. The framework can be used to assess whether the restructuring measures that the Commission demands from the beneficiary bank, are in line with the principle of equal treatment. If this assessment reveals that the required restructuring measures are too severe in comparison with other bank State aid cases, then this assessment can provide the Member State and bank concerned with arguments to negotiate less severe restructuring measures.

With respect to the first stage (i.e. setting-up the aid measure), the framework developed in this PhD-study will provide an insight into the Commission's approach to bank State aid. This insight can be useful to Member States when designing aid measures, because the insight resulting from this PhD-study allows them to better anticipate the "treatment" by the Commission.

One question remains: should a distinction be made between the relevance of this PhD-study to banks on the one hand and Member States on the other hand? They are two distinct parties and they have clearly different positions: the one is granting the aid, while the other one is receiving the aid. It should also be noted that the Commission decision is addressed to the Member State, not to the bank. However, the bank is directly and individually concerned by the decision[16], so it can challenge the Commission decision.[17]

16. "Directly and individually concerned" refers to the so-called "Plaumann-criteria" of case 25/62.
17. The ING-case is a good illustration of the fact that the Member State as well as the bank can initiate legal proceedings. The fact that they each lodged their own application illustrates that their position is not completely the same.

The bank's primary concern is its own interests, whereas the Member State needs to take into account the stability of the entire banking sector. This means that their interests may not always converge. However, this does not mean that this PhD-study is less relevant to them.

Relevance to the Commission

In addition to being relevant to Member States and banks, this PhD-study is relevant for the Commission. Just like Member States and banks can use the framework to assess whether a bank State aid decision complies with the principle of equal treatment, the Commission can use it in the same way to establish whether its decision is in line with the principle of equal treatment. In the first place, the aim of the Commission would be to evaluate its own decisional practice in terms of compliance with the principle of equal treatment. In the second place, it seems likely that the Commission would like to be able to demonstrate that its decisional practice does not violate the principle of equal treatment.

1.4 Scope of the study

This PhD-study focusses on State aid *to banks*. This focus on banks is due to the fact that State aid to banks is somewhat special. As will be explained in chapter 3, banks are different from non-financial firms. The Commission has recognised that State aid to banks is special: during the financial crisis, the Commission adopted the Crisis Framework (mainly consisting of the 2008 Banking Communication, the Recapitalisation Communication, the Impaired Assets Communication and the Restructuring Communication). In these Communications, the Commission gave guidance specifically aimed at State aid to banks. It should be noted that the Crisis Communications do not only apply to banks, but also to other firms in the financial sector (such as insurance companies[18], building societies[19] and credit unions[20]).

In that regard, it is worth stressing that the scope of application of the Crisis Communications is not sharply defined. The 2008 Banking Communication merely speaks of 'financial institutions', without providing a definition of

18. See, for instance: Ethias, 20 May 2010.
19. See, for instance: Dunfermline Building Society, 25 January 2010.
20. See, for instance: SA.41371 (1st prolongation of the Credit Union restructuring and stabilisation Scheme), 5 May 2015, footnote 5.

'financial institutions'. The Recapitalisation Communication and the Prolongation Communications specify that in these documents, for the convenience of the reader, financial institutions are referred to simply as 'banks'.[21]

The 2013 Banking Communication (which replaced the 2008 Banking Communication) is more precise about the scope of application of the Crisis Communications. In particular, point 25 of the 2013 Banking Communication provides that the Crisis Communications apply to 'credit institutions' (also referred to as 'banks'), as defined in Article 4(1) of Directive 2006/48/EC. The scope of application is not limited to banks, since point 26 of the 2013 Banking Communication provides that the Crisis Communications, where appropriate, also apply, mutatis mutandis, to insurance companies.[22]

The approach of the Commission in its Crisis Communications can be contrasted with the CRD IV-approach. Indeed, the CRR and CRD IV contain specific and detailed definitions of 'credit institutions' and 'financial institutions'. By contrast, the Crisis Communications are quite vague about the scope of their application. The Crisis Communications even seem to contradict the CRR-definitions. The terms 'banks', 'credit institutions' and 'financial institutions' are more or less used as synonyms in the various Crisis Communications, whereas CRR/CRD IV makes a sharp distinction between credit institutions and financial institutions.[23] However, it should be noted that CRR/CRD IV has a different purpose than the Crisis Communications. From a financial regulation perspective, it is important to clearly distinguish between the different types of financial firms. By contrast, from a State aid control perspective, this distinction is not that important. From a State aid perspective, the essential difference is between financial firms and non-financial firms. In that regard, the scope of application of the Crisis Framework is specific enough.[24]

21. This was specified in footnote 1 of these Communications. In the same vein, footnote 3 of the Restructuring Communication indicates that although the Restructuring Communication refers to banks for ease of reference, "it applies, *mutatis mutandis*, to other financial institutions where appropriate".
22. Within the meaning of Article 6 of Directive 73/239/EEC, Article 4 of Directive 2002/83/EC or Article 1(b) of Directive 98/78/EC.
23. 'Financial institution' is defined in CRR as an undertaking *other than a credit institution* or investment firm, the principal activity of which is to […]. Thus, according to this definition, a credit institution cannot be a financial institution.
24. The question whether the Crisis Framework is applicable to a case, is rarely raised. Only in the case of ARCO, a financial cooperative company, the Commission assessed whether the beneficiary of State aid fell under the scope of application of the Crisis Framework. In its decision on ARCO (SA.33927, 3 July 2014, para. 120), the Commission concluded that financial cooperatives are not financial institutions for the purposes of the 2008 Banking Communication. The case of ARCO will be discussed in more detail in section 5.10.

In this PhD-study, I will analyse the bank State aid decisions of the Commission.[25] In this PhD-study, 'bank State aid decisions' are understood as every decision in which the Commission assessed the aid on the basis of the Crisis Framework.[26] An overview of the bank State aid decisions can be found in the table in Annex III.[27]

As regards the *temporal scope* of the study, all bank State aid decisions that are taken since the adoption of the Crisis Framework will be analysed. However, there are a few cases in which the public version of the decision is not (yet) available.[28] These decisions are not included in the analysis of the decisional practice, because the contents of the decisions is vital to that analysis. A final remark: this research was concluded on 1 August 2017. Developments after that date are not taken into account in this PhD-study.

1.5 Structure of the study

The aim of this PhD-study is to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This aim guides the structure of this PhD-study. Firstly, the foundations of the framework are laid down in chapters 2 to 5. These chapters provide a background to the topic of bank State aid. Secondly, chapter 6 delves

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25. In this PhD-study, the decisional practice *of the Commission* will be analysed. It should be noted that the Commission is not the only institution that applies State aid rules: the EFTA Surveillance Authority also assesses State aid cases. The EFTA Surveillance Authority assesses State aid measures granted by Iceland, Liechtenstein and Norway (i.e. the EFTA States that are part of the EEA Agreement). NB: the EFTA (European Free Trade Association) consists of Iceland, Liechtenstein, Norway and Switzerland, while the EEA (European Economic Area) is an agreement between the EU and three of the EFTA States; Switzerland is not part of the EEA. The EEA Agreement extends the single market (i.e. the four freedoms) to the EEA and it mirrors the competition and State aid rules of the EU Treaties. Accordingly, the EFTA Surveillance Authority applies State aid rules that are broadly equivalent to the EU State aid rules. Nevertheless, this PhD-study focusses only on the Commission decisions. Decisions from the EFTA Surveillance Authority fall outside the scope of this PhD-study.
26. In this PhD-study, I will also use the term 'Commission decisions' to refer to the bank State aid decisions.
27. In this PhD-study, when referring to a Commission decision, I will usually provide the following information in a footnote: the name of the bank concerned, the case number, the date of the decision and the relevant paragraph. The case number can be used to find the bank State aid decision on the website of the Commission: http://ec.europa.eu/competition/state_aid/register/.
28. In these cases, the only information can be found in the press release. The table in Annex III (which gives an overview of all bank State aid decisions) also indicates the decisions of which the public version is not available.

into the question how the principle of equal treatment can be applied to bank State aid cases. Chapter 6 is thus a pivotal chapter, in the sense that it introduces my framework of analysis. Thirdly, the actual analysis of the bank State aid decisions takes places in the chapters 7 to 13. The conclusions can be found in chapter 14, the final chapter of this PhD-study.

Chapter 2. State aid

2.1 Introduction

Since the topic of this PhD-study is the Commission's assessment of State aid to banks, it might be worthwhile to provide a basic background of the concept "State aid control". This will be done in the present chapter.

The concept of "State aid control" can be captured in a single statement: *in principle, State aid is prohibited, but it can – in certain instances – be authorised ("declared compatible") by the Commission*. This statement touches upon the following questions. Firstly, why is State aid prohibited? Secondly, why is the Commission charged with assessing whether State aid is compatible? Thirdly, when does a measure fall under the scope of the prohibition? Fourthly, in which instances is State aid considered to be compatible with the internal market?

The first two questions concern the *economics* of State aid; these questions will be addressed in section 2.2 of the present chapter. The third question concerns the *existence* of State aid, while the fourth one concerns the *compatibility* of State aid; these questions will be addressed in sections 2.3 and 2.4 of the present chapter. Finally, the procedural aspects of State aid control will be set out in section 2.5.

2.2 The economics of State aid

2.2.1 The adverse effects of State aid

State aid is a remarkable phenomenon. It can be both harmful and beneficial. On the one hand, Member States may have valid reasons to grant State aid. On the other hand, State aid can have adverse effects.

The damaging effect of State aid is that it may create distortions of competition. This is harmful, because competition is generally considered to be desirable. According to economic theory, competition increases welfare, because competition leads to efficiency. There are three types of efficiency: productive efficiency, allocative efficiency and dynamic efficiency.[1]

Productive efficiency means that goods and services are produced at the lowest possible cost. Productive efficiency is achieved when a certain input is used in such a way that results in a maximum output, or alternatively, when a certain output is produced with a minimum input.[2]

Allocative efficiency is based on the economic notion that resources are scarce and can be used in alternative ways. Allocative efficiency is achieved when the scarce resources are used in such a way that will optimally benefit society at large. This is the case when the marginal willingness to pay equals the marginal production costs.

Productive and allocative efficiency are static concepts, in the sense that they focus on maximising welfare at a specific point in time. By contrast, the third type of efficiency is dynamic: this focuses on maximising welfare over a period of time.[3] *Dynamic efficiency* is achieved by investments and innovation. The link with competition is clear: competition may induce undertakings to innovate.

Thus, competition increases efficiency, which – in turn – increases welfare. From this viewpoint, State aid is harmful, because it creates distortions of competition. These distortions can occur in several ways.

In the first place, State aid gives the beneficiary undertaking an unfair competitive advantage over other undertakings which did not receive State aid. This results directly from the characteristic of selectivity of State aid. State aid is a *selective* advantage; an advantage that is only granted to certain undertakings. It is an artificial competitive advantage. It is contrary to the ideal of "competition on the merits".

In the second place, if a Member State recapitalises undertakings which do otherwise not have access to capital (and would subsequently have to leave the market), then State aid can frustrate the normal market functioning. The normal market functioning is based on the principle of "survival of the fittest".[4] As the AG noted in the case C-526/14, "it is in the nature of any economic

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1. Haucap & Schwalbe 2011, p. 6; Nitsche & Heidhues 2006, p. 52.
2. Schwalbe & Zimmer 2009, p. 8.
3. Haucap & Schwalbe 2011, p. 6.
4. See: Adriaanse, Kuijl & Verdoes 2009. Rescuing inefficient banks that are too-big-to-fail goes against the principle of survival of the fittest. Barneveld (2012) aptly called this: "survival of the fattest".

activity that some undertakings – generally the most poorly performing – will fail and leave the market, and their investors, consequently, lose all or part of their investments”.[5] Keeping inefficient undertakings artificially alive negatively affects productive efficiency.[6]

In the third place, State aid influences expectations and incentives. Under normal market conditions, undertakings have an incentive to invest in R&D and innovation, because this will increase their market share. The market share of the competitors will decrease and they may even have to leave the market. However, if undertakings expect that the State will support undertakings in difficulty, then this will reduce their incentives to invest in innovation.[7] State aid not only affects the incentives of the potential beneficiaries of State aid, it also affects the incentives of undertakings that are very successful. If those undertakings expect that their inefficient competitors will be rescued by the State, then this reduces their effort to succeed. Since the State aid allows their inefficient competitors to remain on the market, the reward for success is reduced.[8] This, in turn, reduces the effort to be successful on the market. This might result in a decrease of dynamic efficiency.[9]

In the fourth place, State aid may lead to subsidy races between Member States.[10] If one Member State is granting excessive aid to its undertakings, then other Member States may follow and also give excessive aid to their undertakings. So granting aid may provoke a reaction from other Member States (the so-called “tit-for-tat-strategy”[11]).

In the fifth place, State aid may create *moral hazard*.[12] If undertakings know or expect that they will be rescued when they are about to fall, then they are more inclined to take (excessive) risks. They enjoy the upside, but do not bear

5. Opinion in Case C-526/14 (Kotnik), para. 58. This case will be discussed in chapter 5 of this PhD-study.
6. Friederiszick, Röller & Verouden 2006, p. 653.
7. Ahlborn & Piccinin 2010a, p. 54.
8. Ahlborn & Piccinin, 2010b, p. 136.
9. Friederiszick, Röller & Verouden 2006, p. 653.
10. The risk that State aid might lead to subsidy races was recognised by the Commission in the IAC (point 13b and 16) and in the Recapitalisation Communication (point 8).
11. Nicolaides & Bilal 1999, p. 32.
12. A definition of the term ‘moral hazard’ can be found in *The New Oxford Companion to Law* (2008, by Michel Tison): “This term generally refers to a situation where a person who is exposed to a risk of whatever nature has no incentive to avoid the materialization of the risk because its effects have been transferred to or taken over by someone else. […] Moral hazard will induce a person who is immunized from the (financial) effects of the occurrence of a risk to behave in a less careful way then if he or she were more exposed to it.”

the downside of their actions.[13] This is especially the case for undertakings that are considered to be "too-big-to-fail". Thus, moral hazard may lead to excessive risk-taking.[14]

At this point, it might be useful to elucidate one other aspect: moral hazard and distortions of competition are sometimes bracketed together.[15] This raises the question to what extent they are different distortions: is moral hazard a distortion of competition? In the sense that moral hazard creates perverse incentives and leads to excessive risk-taking, moral hazard is different from competition distortions. Nevertheless, the too-big-to-fail status which creates the moral hazard problem, also creates a distortion of competition: the prospect that the bank will be rescued by the State may make it easier for the bank to raise funding on the market (at a lower cost). In other words: the prospect of State aid may artificially reduce the funding costs of the bank. This gives the bank an undue competitive advantage.[16] This is clearly a distortion of competition.

2.2.2 *Motives for granting State aid*

As explained in the previous subsection, State aid may give rise to competition distortions. This raises the question why governments grant State aid. There may be several motives for governments to grant State aid; motives which can be of an economic or non-economic nature. The economic motives are reflected in the efficiency objective of aid, whereas the non-economic motives are reflected in the equity objective of State aid.

<u>*The efficiency objective*</u>

Market failures may provide a justification for government intervention. Market failure means that the market fails to deliver the optimal outcome.[17] A market failure occurs when the market does not provide a good or service even though the economic benefits are greater than the economic costs.[18] There are several types of market failure. In this section, the two most prominent ones will be discussed: i) externalities, and ii) information asymmetry.[19]

13. Ahlborn & Piccinin 2010a, p 54.
14. This also explains why financial regulation is so important.
15. For instance, point 29 of the Restructuring Communication – which will be discussed in chapter 3 – indicates three types of distortions created by State aid. The first two types of distortion clearly concern competition, whilst the third type of distortion concerns the moral hazard problem.
16. This concern is mentioned in point 9 of the 2014 R&R-guidelines.
17. Buelens et al. 2007, p. 10.
18. Friederiszick, Röller & Verouden 2006, p. 633.
19. The State aid Action Plan (SAAP) also includes coordination problems and market power as examples of market failure.

Externalities

The existence of externalities may provide a justification for granting State aid. "Externalities" is an economic concept and essentially means that economic actors (such as undertakings) cannot fully internalise the costs or benefits of their actions. There are positive externalities and negative externalities. Negative externalities (or external costs) are costs that result from a certain activity, but those costs are incurred by society and not by the undertaking conducting the activity. The classic example of a negative externality is pollution. Assume that an undertaking produces certain products and that the production process causes air pollution. The undertaking itself is not affected by it, but the activity obviously has negative effects on society. In such a situation, the social costs are higher than the private costs.

Positive externalities (or external benefits) occur when a certain activity entails benefits for society which are not appropriated by the undertaking itself. A classic example is R&D. Some R&D-projects are not invested in by undertakings; this occurs when the rate of return on these projects is not attractive from the perspective of the undertaking. This is the case when the undertaking cannot fully appropriate the benefits of the R&D-project; for instance when patents do not provide full protection.[20] However, these projects may still be beneficial for society as a whole, since R&D may create knowledge spillovers or opportunities for other undertakings to develop complementary products and services.[21] In such a situation, the social benefits are higher than the private benefits.

Externalities are a form of market failure, in the sense that the market fails to deliver an efficient outcome.[22] This is because undertakings only take into account the private costs or benefits (and not the social costs or benefits). As a result, in the case of a negative externality, more products are produced than is desirable from a social welfare perspective. In the case of positive externalities, the activity is performed at a smaller scale than would be optimal for society. Giving subsidies (i.e. State aid) to the undertakings concerned may remedy this market failure, because these subsidies induce the undertaking to produce at the optimal scale.

20. As explained by Meiklejohn (1999, p. 28), it can be costly to obtain or enforce patents and the period of validity of the patent may in some cases be shorter than the payback period.
21. As the Commission noted in its R&D&I-Communication.
22. Public goods can be considered as a very specific form of externalities. The defining characteristic of public goods is that they are non-rival and non-excludable. Non-rivalry of consumption means that a good can be consumed by one person without reducing the availability to others. Non-excludability means that people who are not willing to pay for the good, cannot be excluded from using it. Street lighting is a good example of a public good. As a result of the non-excludability of public goods, it is not attractive for undertakings to produce public goods, because they cannot appropriate the benefits: they cannot force people to pay for the consumption of the good, since no one can be excluded from using the good. This means that there is no market for public goods.

Information asymmetry
Information asymmetry means that one side of the market has more information than the other side. A good example is the capital market/credit market. On the demand side, there are undertakings that want to obtain funding for their activities. On the supply side there are banks and investors. The undertakings know more about the prospects and profitability of their activities than banks and investors. Also, the default risk is often unknown to potential suppliers of credit. In other words: there is information asymmetry. As a result, it is difficult for potential investors to distinguish between good and bad investments.[23] Risk-averse investors may be reluctant to provide capital to such undertakings. In economic terms: there is an imperfect matching of supply and demand. This means that some projects will not be financed, even though they are worth financing.

Especially young undertakings and SME's find it difficult to obtain funding.[24] This is because there is less information about them. Information asymmetries may provide a justification for State aid that provides incentives to the financial sector to increase (SME) investments.

The equity objective
The equity objective concerns redistribution of wealth and resources. As Friederiszick, Röller & Verouden put it: the efficiency objective is about "making the cake bigger", the equity objective is about "dividing the cake better".[25] State aid is one of the instruments governments can use to redistribute income. In the absence of market failures, the market will deliver efficient results. This does not mean, however, that the market outcome is equitable/socially desirable. This might provide a reason for the government to intervene. This is the case for regional aid, social aid and aid to promote culture.

Regional aid is a typical example of a redistribution of income. Public funds are used to support the poorer regions of a Member State. Regional aid has an equity objective, because "it is morally, socially and therefore politically unacceptable for a country to allow great differences in the standard of living of its regions".[26]

An example of social aid is aid for the employment of disadvantaged and disabled workers. Employers might be reluctant to hire disadvantaged and disabled workers. As a result, these workers might have difficulties entering (or staying in) the labour market. This is an outcome that is not socially desirable.

23. Neven & Verouden 2008, para. 1.42; Friederiszick, Röller & Verouden 2006, p. 633.
24. Neven & Verouden 2008, para. 1.43.
25. Friederiszick, Röller & Verouden 2006, p. 632.
26. Schina 1987, p. 63.

In order to encourage undertakings to hire more disadvantaged and disabled workers, Member States may choose to subsidise the wage costs of these workers.[27]

Aid to promote culture is another example of the equity objective. If too few cultural goods are produced, then State aid may be justified in order to increase (or sustain) the production of cultural goods. In that regard, it should be noted that the TFEU explicitly recognises the utmost importance of promoting culture.[28]

2.2.3 The effectiveness of State aid

State aid that is intended to correct market failure may seem like a sound policy instrument. However, there are a number of drawbacks which limit the effectiveness of State aid.

Alternatives

The existence of a market failure is a necessary but not a sufficient condition for granting aid. State aid is only an appropriate instrument to address market failure if there are no better options available. This is why State aid has been called a "second-best option".[29] The first-best solution would be to address market failure directly. The most typical alternatives are regulation and taxation. In the case of externalities, there are two approaches: internalisation or subsidisation. For instance, in the case of a negative externality such as air pollution, the government may impose a tax on emissions. The tax would internalise the externality, because the tax entails that the undertaking has to bear the cost of pollution.[30] However, this may put undertakings at a disadvantage compared to undertakings in other countries with a less strict environmental policy.[31]

The Commission has recognised that there are alternatives to State aid. In many of its Communications, the Commission stresses that aid should be an 'appropriate policy instrument'.[32]

Difficult to measure

It is difficult to measure the exact size of the market failure. As a result, it is difficult to determine the right amount of State aid. For instance, in the case of positive externalities, the social benefits are greater than the private benefits. As a

27. This type of State aid is dealt with in "Communication from the Commission – Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification".
28. Article 167(2) and 167(4) TFEU. Communication from the Commission on State aid for films and other audiovisual works, para. 9-10.
29. Nicolaides 2008, p. 92.
30. It has been argued that a tax on pollution is a "first-best policy". See: Crocioni 2006, p. 92.
31. Meiklejohn 1999, p. 29.
32. See for example: Communication from the Commission – Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification, para. 8.

result, the undertaking produces less than is optimal from a social welfare perspective. The government may induce the undertaking to produce at the optimal scale by granting subsidies. Optimally, the amount of the subsidy should equal the difference between the social and private benefits. This, however, may be difficult to determine.

The costs of State aid

Government intervention may have benefits. But there is also a cost-side. State aid should only be granted if the benefits outweigh the costs. State aid is costly and has to be financed. In the end, taxpayers bear the cost.[33] Furthermore, state resources are limited. Funds that are used to finance State aid cannot be used to finance other domains of government. This is called the opportunity cost of State aid.[34]

Government failures

It is perhaps ironic that a government intervention which is intended to correct a market failure, may be subject to a "government failure". This is the case when the intervention is misdesigned or misimplemented. Politicians do not always take the "right" decisions. There are several reasons for this. Firstly, there may be information asymmetry. Governments do not have perfect information. Secondly, politicians may be susceptible to lobbying. State aid policy may have been captured by special interest groups. Thirdly, politicians wish to be re-elected and sometimes, they pursue their private goals.[35] State aid may make politicians popular, especially when the benefits are more easily perceived than the costs. These three reasons (information asymmetry, lobbying and self-interest) may be interrelated. If politicians do not possess enough information, then they may be more susceptible to lobbying.[36] Also, politicians may decide to grant State aid according to the wishes of certain interest groups, because this may have favourable electoral consequences.

2.2.4 State aid control

All State aid measures have to be notified to the Commission. State aid measures are in principle prohibited and can only be implemented when they are authorised by the Commission. By assessing State aid measures, the Commission exercises State aid control. A key feature of State aid control is that it is exercised by a supranational institution (i.e. the Commission). Why should State aid control be performed by a supranational institution? This is due to the following two reasons.

33. This is also recognised in the State aid Action Plan (para. 8).
34. Friederiszick, Röller & Verouden 2006, p. 637; Haucap & Schwalbe 2011, p. 30.
35. Friederiszick, Röller & Verouden 2006, p. 637.
36. Buelens et al. 2007, p. 8.

Preventing subsidy wars

One of the purposes of State aid control is to prevent subsidy wars. State aid may have negative spill overs: it may benefit undertakings in one Member State at the expense of other Member States.[37] This might result in a "beggar-thy-neighbour policy".[38] As was described in section 2.1, granting aid may provoke retaliatory measures by other Member States. This is the so-called "tit-for-tat strategy".[39] The subsidy competition is individually rational, but collectively wasteful.[40] Granting aid to domestic undertakings is individually rational, because it is the dominant strategy. This can be illustrated by the following example: If Member State A is the only Member State that grants aid, then the undertakings of Member State A will have a competitive advantage. In this case it would be rational for Member State A to grant aid. In the case that other Member States also support their own industries, it would still be rational for Member State A to grant aid to its undertakings: not to gain a competitive advantage, but to level the playing field. So in both cases, it would be rational to grant aid. The collective outcome is that each Member State will grant aid. However, all Member States would be better off if none of them would grant aid. The only result of the subsidies is "reciprocal neutralisation": the subsidies cancel each other out.[41] As a consequence, government funds are used to subsidise undertakings, but no Member State has gained a competitive advantage. The only ones who benefit are the undertakings that are subsidised. The governments (in the end: the taxpayers) have to bear the cost. In economic terms: funds are transferred from the rest of society to undertakings. To conclude, while each Member State has an incentive to grant State aid, it would be in the collective interest not to grant State aid. To solve this prisoner's dilemma, a supranational institution is needed.[42]

Providing a shield against domestic lobbying

State aid is not always effective. Especially in the case of government failures, State aid may be a waste of government funds. Governments may be susceptible to domestic lobbying. State aid control may provide a shield against domestic lobbying, because it entails that the ultimate decision is not taken by the national government, but by the European Commission. A supranational

37. Positive cross-border spillovers are also possible. This is the case when subsidised undertakings use imported goods as input.
38. Nicolaides & Bilal 1999, p. 4.
39. Nicolaides & Bilal 1999, p. 5.
40. Friederiszick, Röller & Verouden 2006, p. 638.
41. European Commission's First Report on Competition Policy, 1972, p. 116.
42. For this reason, State aid control can be viewed as "an act of rational self-commitment" (Haucap & Schwalbe 2011, p. 5) or as a "disciplining device" (Heimler & Jenny 2012, p. 351).

institution would be less vulnerable to domestic lobbying.[43] Thus, State aid control reduces government failures. It is a way to limit excessive aid and wasteful spending. This is often cited as a rationale for supranational State aid control. It is however doubtful whether the Commission is really invulnerable to lobbying.[44]

2.2.5 Concluding remarks

As explained in the present section, there may be valid reasons to grant State aid, but State aid can also be harmful. A "good" State aid policy enhances social welfare, while a "wrong" State aid policy reduces social welfare. In essence, State aid control tries to ensure a good State aid policy, by authorising the "good" State aid measures while prohibiting the "wrong" measures.

2.3 The (legal) notion of State aid

In the previous section, the economics of State aid have been explained. In the present and following sections, the legal aspects of State aid will be discussed. The State aid rules can be found in the Treaty on the Functioning of the European Union (TFEU). The State aid rules date from the very beginning of the European treaties. There have been several treaty changes and the provisions on State aid have been renumbered several times, but their contents have (largely) remained the same.[45] The substantive State aid rules are laid down in Article 107 TFEU. Article 107, paragraph 1, TFEU states that:

> "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

43. See also: Crocioni 2006, p. 93.
44. See also: Friederiszick, Röller & Verouden 2006, p. 644; Buelens et al. 2007, p. 8.
45. The original provisions were Article 92 and 93 of the Treaty establishing the European Economic Community (EEC Treaty). Following the Treaty of Maastricht (which entered into force on 1 November 1993), the EEC Treaty was renamed as the Treaty establishing the European Community (EC Treaty) and renumbered: the State aid rules were laid down in Article 87 and 88 EC. The State aid provisions were renumbered again on 1 December 2009, when the Treaty of Lisbon entered into force. Following this treaty, the EC treaty was renamed as the Treaty on the Functioning of the European Union (TFEU) and renumbered. The State aid rules are now laid down in Article 107 and 108 TFEU.

For a measure to fall under the definition of "State aid", six criteria have to be fulfilled:

1) The aid must be granted by the state or through state resources
2) The recipient of aid must be an undertaking
3) The aid must confer an advantage to the recipients
4) The advantage must favour certain undertakings or economic activities
5) The aid must affect trade between Member States
6) The aid must distort competition in the common market

These criteria are cumulative. This means that a measure only constitutes State aid if all these criteria are met. It should also be noted that although I have distilled six criteria from Art. 107(1) TFEU, some authors only distil five criteria.[46] Furthermore, the Court usually identifies four criteria.[47]

It is important that the notion of "State aid" is clearly defined. An overly broad interpretation of "State aid" would mean that many measures fall under the scrutiny of the Commission.[48] This would result in an enormous administrative burden for both the Member States and the Commission. As a consequence, the effectiveness of State aid control will be reduced.

In that regard, it is worth stressing that the criteria of Article 107(1) TFEU have been interpreted and clarified in the case-law of the Court. In the context of the State aid Modernisation (SAM), the Commission announced its intention to provide clarification and better explanation of the notion of State aid.[49] This led to the Commission Notice on the notion of State aid.[50] Notwithstanding this Commission Notice, the Court has the final say on the interpretation of the notion of "State aid". As the following subsections clearly illustrate, the Court has had an important role in clarifying the notion of "State aid".

46. For instance, Adriaanse (2006, p. 19) identifies five criteria. He treats the criterion that the aid must favour "certain undertakings" as a single criterion, while I have separated it into two distinct criteria: "certain" (i.e. criterion 4) and "undertaking" (i.e. criterion 2).
47. See, for instance: Case C-677/11, para. 25: "Article 107(1) TFEU makes that incompatibility subject to the confirmation that four conditions have been met. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition."
48. Prek & Lefevre 2012, p. 335. See also: Lopez 2010, p. 807-819. Hancher 2003, p. 365-373.
49. SAM, para 23a.
50. Communication from the Commission – Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU. NB: the Commission first published a Draft Notice.

2.3.1 *Criterion 1: The aid must be granted by the state or through state resources*

Unsurprisingly, an aid measure can only be categorised as "State aid" when it is granted by the State. However, the notion "Member State" does not only include the central government, but also the regional and local governments.[51] In that regard, it has been argued in the literature that the term "government aid" would actually better capture the essence of this criterion than the term "State aid".[52]

Alternatives?
The phrase "granted by the state or through state resources" may be confusing. It can be understood as one criterion, but it can also be interpreted as two alternative criteria. According to the latter interpretation, only one of the two criteria has to be met. If, for instance, it is established that a Member State grants aid, then it does not have to be proven that State resources are involved. In the past, the case-law of the Court was not always clear on this matter, but in 1993, the Court decided in case C-189/91 that the terms "granted by the state" and "through state resources" are no alternatives.[53] Thus, for a measure to satisfy the criterion "granted by the state or through state resources", it must be, first, granted directly or indirectly through State resources, and second, be imputable to the State. This means that two cumulative requirements have to be met.[54]

State resources
For a measure to be capable of being categorised as State aid, it should be granted, directly or indirectly, through State resources. This criterion is not fulfilled when the measures have no budgetary effect for the State. This means that regulatory measures which have no impact on the budget of the State are not caught by Article 107 TFEU. For instance, when a State relaxes the anti-pollution regulation, this may confer an advantage to certain undertakings. However, since the relaxation of the anti-pollution regulation has no impact on the budget of the State, no state resources are involved, so this regulatory measure does not fall under the scope of Article 107 TFEU.[55]

51. Nicolaides, Kekelekis & Kleis 2008, p. 11.
52. Hessel et al. 2005, p. 83.
53. Case C-189/91, para. 16.
54. See also: Clayton & Segura Catalan 2015, p. 260-270.
55. I borrowed the example of a relaxation of anti-pollution regulation from Nicolaides, Kekelekis & Kleis 2008, p. 14. Another example to illustrate that regulatory measures do not meet the criterion of "granted by the state or through state resources" is given by Dekker & Van der Wal (2008, p. 23). The example that they give, is a change of the zoning plan.

The case-law from the Court has clarified the notion of “State resources”. The Court has held that a measure can be capable of being regarded as State aid within the meaning of Article 107 TFEU, even if there is no transfer of state resources.[56] For instance, a tax exemption does not involve a transfer of state resources, but it nonetheless has a budgetary impact and is therefore capable of being regarded as State aid.

Imputable to the State

If the aid is directly granted by the State, then it is obvious that the criterion “granted by the state or through state resources” is met. However, some situations are less clear-cut. For instance, if aid is granted through an intermediate body.

There is an entire body of case-law about the question whether aid is imputable to the State. The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken.[57]

The Court has held that no distinction is to be drawn between cases where the aid is granted directly by the State and those where it is granted by public or private bodies which the State establishes or designates with a view to administering the aid. EU law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.[58]

Even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. A public undertaking may act with more or less independence, according to the degree of autonomy left to it by the State. Therefore, the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking to be imputed to the State. The public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures.[59]

If the body cannot take the measure without taking account of the requirements of the public authorities, then it can be concluded that the measure is the result of the actions of the State.[60] As a result, it is capable of being categorised as State aid.

56. Case C-387/92 (Banco Exterior de España v Ayuntamiento de Valencia), para. 14; Case C-6/97 (Italy v Commission), para. 16; Case C-482/99 (Stardust Marine), para. 36.
57. Case C-482/99 (Stardust Marine), para. 55.
58. Case C-482/99 (Stardust Marine), para. 23.
59. Case C-482/99 (Stardust Marine), para. 52.
60. Joined Cases 67, 68, 70/85 (Van de Kooy), para. 37-38.

2.3.2 Criterion 2: The recipient of aid: "undertaking"

The recipient of the aid must be an undertaking. Article 107 TFEU covers both private and public undertakings.[61] The notion of "undertaking" under Article 107 TFEU is the same as under Article 101 TFEU. It should be noted that the term "undertaking" is not defined in the Treaty. However, as with many other concepts in the Treaty, the Court has interpreted the concept of undertaking. In C-41/90, the Court has given the following definition: undertakings are natural or legal persons engaging in economic activities.[62]

This definition raises another question: what is an "economic activity"? Also this concept is interpreted in the case-law: an economic activity is any activity consisting in offering goods and services on a given market.[63] In that regard, it should be noted that some activities belong to the exclusive competence of the State, such as issuing passports. The State has reserved these activities for itself. They relate to the exercise of state prerogatives. As a result, there is no market for such activities, and they therefore cannot be regarded as economic activities.

The decisive issue is thus whether the entity is engaging in an economic activity. The size of the entity, its legal status or the way in which it is financed are not relevant when determining if an entity can be classified as undertaking. Also a profit motive is not required, so also non-profit organisations are capable of being categorised as undertaking.[64]

The Court has given a broad interpretation of the notion of "undertaking". Consequently, several organisations which at first sight might not appear to be undertakings, fall under the scope of the State aid rules. Hospitals, museums, theatres and professional football clubs are examples of organisations that have been categorised as undertakings. It is important to note that an entity is only an undertaking with respect to its economic activities.[65] If an entity engages in both economic activities and other activities, then it is only an undertaking with respect to its economic activities. As a result, the State aid rules only apply to those activities. This may be the case for museums and theatres who engage in both purely cultural activities and more commercial activities.[66]

61. Case 78/76 (Steinike & Weinlig), para. 18.
62. Case C-41/90 (Hofner and Elser).
63. Joined cases C-180/98 to C-184/98 (Pavlov and Others), para. 75.
64. Adriaanse, p. 25; Dekker & Van der Wal 2008, p. 31.
65. Dekker & Van der Wal 2008, p. 32-33.
66. Dekker & Van der Wal (2008, p. 33) give the example of Aviodrome Lelystad.

2.3.3 Criterion 3: The aid must confer an advantage to the recipients

Naturally, State aid implies that the aid measure confers an advantage to the recipient. However, the real question is: what exactly is an "advantage"?

General principles

First of all, the notion of State aid covers much more than only subsidies. This clarification came when the Court rendered its judgment in the case 30/59. The Court held that the concept of aid is wider than that of a subsidy.[67] The reason is that the notion of aid embraces not only positive benefits, but also interventions which mitigate the charges which are normally included in the budget of an undertaking. These interventions are not subsidies in the strict meaning of the word, but they are similar in character and have the same effect.

The form of the aid measure is irrelevant.[68] Also the aim, objectives or intentions of the aid measure are irrelevant. The only issue that matters is whether the aid measure has the *effect* of favouring certain undertakings. This is the case when the undertaking enjoys an advantage that it would not have obtained in normal market conditions.

For instance, if a public authority purchases goods from an undertaking at a price that is above the market price, then the difference between the market price and the actual price may constitute an advantage to the undertaking. Similarly, if a public authority sells goods to an undertaking at a price that is below the market price, then the difference between the market price and the actual price may constitute an advantage. By the same token, a loan granted to an undertaking at an interest rate below the market rate of interest may confer an advantage to the undertaking.

To conclude, an advantage within the meaning of Article 107(1) TFEU does not refer to any advantage; it only refers to a gratuitous advantage.[69] In other words: it refers to an advantage that an undertaking would not have obtained in normal market conditions. Undertakings are allowed to make profit, so a transaction with a public authority that is advantageous to an undertaking does not necessarily confer an 'advantage', since a lucrative transaction may be in line with normal market conditions. However, any transaction that deviates from normal market conditions may constitute an advantage.

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67. Case 30/59 (De Gezamenlijke Steenkolenmijnen in Limburg v High Authority), Case C-387/92 (Banco Exterior de España), para. 13.
68. According to established case-law, "measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained in normal market conditions are regarded as aid". See Case C-34/01 (Enirisorse), para. 30.
69. Winter 2004, p. 487.

Market economy investor principle

In order to be able to assess whether a transaction deviates from normal market conditions, the Commission applies the Market Economy Investor Principle.[70] Originally, this test was applied to public undertakings that were recapitalised by the Member states.[71] But it has become a general criterion that is applied to all kinds of transactions between a member state and its undertakings. Depending on the type of transaction, one could speak of a "private investor test"[72], "private creditor test", "private purchaser test" or "private vendor test".[73] In the Notice, the Commission introduced the term "Market Economy Operator" to capture the different types of transaction.[74]

The essence of the private investor test is that the behaviour of the public authority is compared to that of a hypothetical private investor. If the public authority acts like a private investor would do (under similar circumstances), then the transaction contains no aid-element. Comparing the behaviour of the public authority and that of a hypothetical private investor makes it necessary to determine the behaviour of the hypothetical private investor. In the case-law from the Court, several factors and indicators were developed.

The most essential characteristic of a private investor is that he is solely motivated in making a profit. In T-228/99, the Court specified that the private investor would, when calculating the appropriate return to be expected for his investment, in principle require a minimum return equivalent to the average return for the sector concerned.[75]

The private investor does not pursue other objectives than making a profit. All social, regional-policy and sector considerations should be left aside; they cannot be taken into account when applying the private investor test.[76]

However, the fact that a private investor is motivated in making a profit does not mean that he is only interested in short-term profits. There are situations in which a private investor would tolerate short-term losses. The Court has given the following clarification:

70. The history of the Private Investor Principle dates back to 1984, when the Commission adopted the Communication on Government Capital injections. See: Nicolaides & Rusu 2011, p. 238; Saanen 2014.
71. Kohler 2011, p. 22.
72. In this PhD-study, the terms "market economy investor" and "private investor" are used interchangeably.
73. Hessel et al. 2005, p. 95.
74. Draft Notice, para. 78.
75. Case T-228/99 (WestLB), para. 255.
76. Case 234/84, para. 14.

> "It should be added that although the conduct of a private investor with which the intervention of the public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realizing a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy – whether general or sectorial – and guided by prospects of profitability in the longer term."[77]

The Court has also recognised that a parent company may be willing to temporarily bear the losses of one of its subsidiaries, in order to protect the group's image.[78]

The Court has stressed repeatedly that assessment by the Commission of the question whether an investment satisfies the private investor test involves a complex economic appraisal.[79]

The burden of proof is on the Member State. It has to prove that its behaviour is comparable to that of a private investor. This can be a difficult task. However, with respect to some transactions, it is easier to establish that the public authority is acting in line with market conditions. This is the case when private investors invest in the undertaking concerned *at the same time* and *under the same conditions* as the public authority. Such a transaction is called a "pari passu transaction".[80] The capital that the State has injected in that undertaking is then presumed not to constitute State aid. There is a "pari passu transaction" when:

- the private investment is significant,[81]
- the private investment is simultaneous (concomitance),
- the private investment is done under comparable terms and conditions,
- their starting position should be comparable.

It is for the Member State to prove that these pari passu conditions are fulfilled.

The private investor test is not always easy to apply in practice, since it can be a difficult task to determine how a private investor would behave. Besides this practical concern, there are also some conceptual concerns raised in the literature.[82] The most prominent concern is that the State can never be fully

77. Case C-305/89 (Italy v Commission), para. 20. See also Case C-303/88 (Italy v Commission), para. 21 and 22.
78. Case C-303/88 (Italy v Commission), para. 21.
79. Case T-296/97 (Alitalia – Linee aeree italiane SpA v Commission), para. 105; Case C-56/93 (Belgium v Commission), para. 10 and 11; Case T-358/94 (Air France), para. 71; Joined Cases T-126/96 and T-127/96 (BFM and EFIM v Commission), para. 81. See also Case T-19/37 (ARR).
80. Draft Notice, para. 88.
81. See for an example where the private investment was not significant: T-358/94 (Air France), para. 148-149.
82. See: Parish 2003; Saanen 2014.

comparable to a private investor. Notwithstanding these concerns, the private investor test has become a general criterion that is applied to all kinds of transactions between a Member State and its undertakings.

2.3.4 Criterion 4: The advantage must favour certain undertakings or economic activities

A State measure which benefits all undertakings in national territory, without distinction, cannot constitute State aid.[83] Only measures that favour *certain* undertakings or economic activities can be considered State aid. This is known as the "selectivity-criterion" or "specificity-criterion". This criterion is very understandable from the rationale of State aid control. Aid measures that favour only certain undertakings distort the level playing field. They affect the balance between the beneficiary and its competitors.

The Court formulated the 'selectivity-criterion' as follows:

> "It should be observed that the specific nature of a State measure, namely its selective application, constitutes one of the characteristics of State aid within the meaning of [Article 107(1) TFEU]. In that regard, it is necessary to determine whether or not the measure in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity."[84]

Measures that meet the selectivity-criterion are capable of being categorised as State aid. There are several ways in which the selectivity-criterion is met. Firstly, individual aid is selective. Secondly, aid that is granted to certain classes of undertakings meets the selectivity-criterion. Thirdly, aid that is granted to certain sectors of the economy is selective. Sectoral aid has always been considered by the Court as selective.[85] Fourthly, aid that is granted to certain regions is selective.

Selective measures are thus capable of being categorised as State aid. General measures, on the other hand, fall outside the scope of the State aid rules. A general measure means that the measure is open to all undertakings. It can be difficult to draw a line between selective measures and general measures. In the case-law of the Court, some clarifications can be found.[86] First of all, discretion

83. Case C-143/99 (Adria-Wien), para. 35.
84. Case T-55/99, para. 39; Case C-241/94 (France v Commission), para. 24; Case C-200/97 (Ecotrade), para. 40 and 41; Case C-75/97 (Belgium v Commission), para. 26.
85. Gebski 2009, p. 92.
86. Notwithstanding these clarifications, it has been argued in the literature that the concept of selectivity is still far from clear. See, for instance: Bartosch 2010, p. 729-752.

is an important factor when assessing the selectivity of an aid measure. When a public authority has discretion in granting aid, then the measure – even though it is of a general nature – may fall under the scope of Article 107(1) TFEU. Furthermore, the fact that there is no prior identification of the aid beneficiaries does not preclude the selective nature of the measure.[87] In addition, the fact that a large number of undertakings are eligible for the aid measure does not mean that the aid measure is not selective.[88]

The question whether a measure is general or selective often occurs with respect to tax measures. Taxation is usually a general measure, but a preferential tax treatment could be selective.

2.3.5 Criterion 5: The aid must distort competition in the common market

Some handbooks on State aid discuss criteria 5 and 6 together. Much could be said for this approach, because the conditions that trade between Member States must be affected and competition distorted, are as a general rule inextricably linked.[89]

The condition that aid must distort competition is easily met. This is because an actual effect on competition is not required; a potential effect is sufficient.[90] However, a mere reference to the selective nature of the aid measure is insufficient to prove that the aid distorts competition.[91] Even if in certain cases the very circumstances in which the aid is granted are sufficient to show that the

87. See Case T-55/99, para. 40: "The fact that the aid is not aimed at one or more specific recipients defined in advance, but that it is subject to a series of objective criteria pursuant to which it may be granted, within the framework of a predetermined overall budget allocation, to an indefinite number of beneficiaries who are not initially individually identified, cannot suffice to call in question the selective nature of the measure and, accordingly, its classification as State aid within the meaning of Article 92(1) of the Treaty. At the very most, that circumstance means that the measure in question is not an individual aid. It does not, however, preclude that public measure from having to be regarded as a system of aid constituting a selective, and therefore specific, measure if, owing to the criteria governing its application, it procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others."
88. See C-143/99 (Adria-Wien), para. 48: "Neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy."
89. This follows from settled case-law. See for instance: Case T-288/97, para. 41. See also: Alzetta v Commission, para. 81; Case 730/79 (Philip Morris v Commission), paragraph 11; Case C-278/92, para. 40.
90. Dekker & Van der Wal 2008, p. 36.
91. Joined cases C-15/98 and C-105/99 (Italy v Commission), para. 67.

aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision.[92]

With respect to the criterion that the aid must distort competition in the common market, the *De minimis* regulation[93] is of great importance. This Regulation states that aid of no more than EUR 200.000 granted over a period of three years is not regarded as State aid within the meaning of Article 107(1) TFEU.[94]

2.3.6 Criterion 6: The aid must affect trade between Member States

As was explained in the previous subsection, the conditions that trade between Member States must be affected and competition distorted, are as a general rule inextricably linked. This means that trade is regarded as affected by the aid, when the aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Union trade.

The background of this criterion is that EU-law does in principle not apply to purely domestic situations. In that regard, it should be pointed out that the fact that an undertaking is not engaged in cross-border trade or only operates locally or regionally, does not preclude the existence of an effect on intra-Union trade.[95] This is because the aid makes it more difficult for undertakings from other Member States to enter the market on which the beneficiary undertaking is operating.

The criterion of effect on trade between Member States was elucidated by the Court in one of the bank State aid cases. In its judgment in the case C-667/13 (Banco Privado Portugues) – which will be discussed further in chapter 5 of this PhD-study – the Court held that, when aid granted by a Member State strengthens the position of an undertaking in comparison with other competing undertakings in trade between Member States, that trade must be regarded as being affected by that aid. In this regard, the fact that an economic sector, such as that of financial services, has been involved in a significant liberalisation process at EU level, enhancing the competition that may already have

92. Joined Cases 296/82 and 318/82 (Netherlands and Leeuwarder Papierwarenfabriek), para. 24; Joined Cases C-329/93, C-62/95 and C-63/95 (Germany and Others v Commission), para. 52; Joined Cases C-15/98 and C-105/99, para. 66.
93. Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the functioning of the European Union to de minimis aid.
94. Article 3 of the De Minimis Regulation.
95. Draft Notice, para. 192-193.

resulted from the free movement of capital provided for in the Treaty, may serve to determine that the aid has a real or potential effect on competition and affects trade between Member States.[96]

2.3.7 Concluding remarks

The present section discussed six (cumulative) criteria. When a measure meets all these criteria, it is a "State aid measure" within in the meaning of Article 107(1) TFEU. Consequently, the measure falls under the prohibition. Nonetheless, the aid measure may still be authorised when the Commission considers it to be compatible with the internal market. This compatibility-assessment will be set out in the following section.

2.4 The compatibility of State aid

In principle, State aid is prohibited. This follows from Article 107(1) TFEU. However, it is a prohibition with several exemptions. Those exemptions are listed in paragraphs 2 and 3 of Article 107 TFEU. Paragraph 2 lists the situations in which the aid *is* compatible with the internal market. Paragraph 3 lists the situations in which the aid *may be* compatible with the internal market. In other words: the situations of paragraph 2 are automatically compatible with the internal market; with respect to the situations under paragraph 3, the Commission has discretion.[97]

Besides the exemptions under Article 107(2) and (3), there are also two other provisions which are relevant: Article 93 TFEU and Article 106(2) TFEU.[98] Article 93 TFEU applies to State aid to transport, but this provision will not be discussed in this PhD-study. Article 106(2) TFEU concerns services of general economic interest (SGEI). SGEI are services that are not provided by market forces alone. However, they are in the interest of society as a whole. Certain services are so essential that they must be guaranteed to all citizens on affordable conditions.[99] The postal services are a classic example of SGEI.[100]

96. Case C-667/13, para. 51.
97. The fact that Article 107(3) TFEU gives the Commission discretion was confirmed by the Court in Case 730/73 (Philip Morris), para. 17.
98. Nicolaides, Kekelekis & Kleis 2008, p. 66.
99. Sutton 2008, p. 191.
100. Dekker & Van der Wal 2008, p. 41.

According to Article 106(2) TFEU, services of general economic interest fall under the scope of the competition rules, but they can be exempted.[101]

2.4.1 Article 107 (2) TFEU

Art. 107(2) TFEU provides for three situations in which aid is automatically authorised.[102] The first situation relates to price subsidies that enable the provision of services at lower rates to disadvantages users (such as low income groups, handicapped people or elderly people).[103] The second situation relates to compensation for damage caused by natural disasters or exceptional occurrences. The third situation relates to compensation for the disadvantages that were caused by the division of Germany. However, since the reunification of Germany, aid has not been authorised on the basis of this provision.[104]

The exemption of Article 107(2)(b) has received the most attention in the literature. On the basis of this provision, compensation for damage caused by natural disasters or exceptional occurrences is automatically authorised. This raises the question what constitutes a 'natural disaster' or 'exceptional occurrence'. In the decisional practice of the Commission, these notions have been clarified. In the context of the Netherlands, the following cases can serve as a good example of aid that falls under the scope of Article 107(2)(b) TFEU: the firework disaster in Enschede[105], and the flooding of the Maas in 2003[106].

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101. Article 106 (2) TFEU provides that: "Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union."
102. Art. 107(2) TFEU reads as follows: "The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point."
103. Alberto Santa Maria, p. 51.
104. Nicolaides, Kekelekis & Kleis 2008, p. 45.
105. N217/2002.
106. N42b/2003.

2.4.2 Article 107 (3) TFEU

Art. 107(3) TFEU provides for five situations in which aid may be authorised.[107] Not all of these five provisions are equally important. Article 107(3)(a) and (c) are usually considered to be the most important exemptions.[108] The other provisions are less frequently used.

The Commission can authorise regional aid on the basis of (a) and (c). Article 107(3)(c) TFEU is wider in scope than (a), because Article 107(3)(a) only applies to regions where the standard of living is abnormally low or where there is serious underemployment. This requirement does not apply to aid that is based on Article 107(3)(c) TFEU. Article 107(3)(c) TFEU is not only used in relation to regional aid; it also provides an exemption for other types of aid. In fact, most horizontal rules are based on Article 107(3)(c) TFEU.

Until the financial crisis of 2008, the exemption of Article 107(3)(b) TFEU was rarely used.[109] The financial crisis of 2008 changed this: the Commission created the so-called Crisis Framework, which was based on Article 107(3)(b) TFEU. This Crisis Framework will be discussed in detail in section 3.4.1.

2.4.3 The Communications, Guidelines and Notices

The Commission has adopted numerous Communications. They go by different names (i.e. Communications, Guidelines or Notices), but there is no significant difference between these types of documents.[110] The purpose of the Communications is to provide guidance. This guidance is intended to make the Commission's reasoning transparent and to create predictability and legal certainty.[111] The legal status of the Communications can be characterised as

107. Art. 107(3) TFEU reads as follows: "The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."
108. Nicolaides, Kekelekis & Kleis 2008, p. 48.
109. Only in the "Greek industry case" the Commission authorised the aid. See: Commission decision 88/167/EEC of 7 October 1987.
110. Dekker & Van der Wal 2008, p. 56.
111. This purpose is explicitly stated in many communications. See for instance: Communication from the Commission – Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification, para. 2.

'soft law'. In other words: they are not binding instruments. However, it is important to point out that by issuing Communications, the Commission is self-limiting its discretion.[112] The legal status of the Communications will be discussed in more detail in section 3.4.3.

The Communications, Guidelines and Notices are published in the Official Journal. Furthermore, they can easily be found at the Commission website.[113] On that website, the following categories can be found:
- Sector-specific rules: agriculture, audio-visual production, broadband, broadcasting, coal industry, electricity, fisheries, postal services, shipbuilding, steel, synthetic fibres (motor vehicles industry), transport.
- Horizontal rules: aid to disadvantaged and disabled workers, training aid, regional aid, research and development and innovation, environmental aid, risk capital, rescue and restructuring aid.
- Specific aid instruments: state guarantees, public land sales, export credit insurance, fiscal aid (direct business taxation).
- Block exemption regulations
- Temporary rules in response to the crisis
- Services of general economic interest (SGEI)

As the name indicates, sector-specific rules apply to a specific sector. Horizontal rules, on the other hand, apply (in principle) to all sectors. The specific aid instruments could be considered as a category on its own, or it could be considered as belonging to the category of horizontal rules.[114]

This PhD-study will not discuss all these Communications, Guidelines and Notices in detail.[115] The only Communications that deserve an in-depth discussion are the Crisis Communications, which will be discussed in chapter 3. However, in the current section, some remarks can be made regarding the compatibility assessment. In that regard, two Commission initiatives are worth mentioning: in 2005, the Commission adopted the State Aid Action Plan (SAAP), followed by the State aid Modernisation (SAM) in 2012.[116] In the context of first the SAAP and later the SAM, several Guidelines were revised.

112. Santa Maria 2007, p. 56.
113. http://ec.europa.eu/competition/state_aid/legislation/legislation.html
114. Dekker & Van der Wal 2008, p. 89.
115. The added value of a detailed discussion would be limited in this PhD-study which is concentrated mostly on aid to banks. Furthermore, the Guidelines and Communications are amended and updated over time, so a detailed discussion would not have a lasting value.
116. The SAAP was aimed at "less and better targeted aid" and "a refined economic approach". For more information, see: Hildebrand & Schweinsberg 2007, p. 454.

Common Assessment Principles

In the context of the SAAP and SAM, the Commission set out a methodology for the compatibility-assessment. The SAAP formally introduced the balancing test. The balancing test entailed that the Commission would balance the positive impact of the aid measure against the potentially negative effects.[117] In the SAM, the Commission called for identification of the common assessment principles.[118] The common assessment principles are largely based on the balancing test. The guidelines that were adopted in the context of the SAM explicitly refer to the common assessment principles. A State aid measure will be considered compatible when the following criteria are met:

Contribution to well-defined objective of common interest

A State aid measure must aim at an objective of common interest in accordance with Article 107(3) TFEU. The exact objective depends on the type of aid. For instance, in the Guidelines on R&D&I-aid, the Commission recognised that "R&D&I aid should contribute to the achievement of the Europe 2020 strategy of delivering smart, sustainable and inclusive growth".[119] State aid to the agriculture sector should be aimed at ensuring viable food production and at promoting the efficient and sustainable use of resources in order to achieve intelligent and sustainable growth.[120]

Need for state intervention

A State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself. This refers to market failures.

Appropriateness of the aid measure

The aid measure must be an appropriate policy instrument to address the policy objective concerned. In that regard, it should be noted, firstly, that State aid is not the only policy instrument and, secondly, that there are various types of aid instruments.

If other less distortive policy instruments make it possible to achieve the same goal, then the aid measure is not the most appropriate instrument. In the same vein, if there are other less distortive types of aid measures, then the aid measure is not the most appropriate instrument.

117. SAAP, para. 19.
118. SAM, para. 18a.
119. R&D&I-guidelines 2014, point 42.
120. European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020, point 43.

Incentive effect
The aid measure must change the behaviour of the undertaking concerned. In other words: the aid measure must induce the undertaking to engage in additional activity which it would not carry out without the aid.

Proportionality of the aid
The proportionality of aid concerns the following question: could the same change in behaviour be obtained with less aid? For an aid measure to be considered proportional, its amount must be limited to the minimum needed for carrying out the aided activity.

Avoidance of undue negative effects
For State aid to be compatible with the internal market, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of common interest.

Transparency of aid
Member States, the Commission, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded thereunder.

The General Block Exemption Regulation (GBER)
In 1998, the Council adopted the Enabling Regulation.[121] This Regulation enables the Commission to adopt block exemption regulations. In those regulations, the Commission can declare certain types of aid compatible with the common market. Those aid measures are exempted from the notification requirement of Article 108(3) TFEU.

The purpose of block exemptions is to relieve the Commission from an administrative burden.[122] There are many State aid cases in which it is almost obvious that the compatibility conditions are satisfied. If the Commission would have to spend time on all those cases, then it would have less time to concentrate on the more distortive State aid cases. By providing that certain cases (that are clearly compatible) do not have to be notified to the Commission, block exemption regulations allow the Commission to concentrate on the more distortive State aid cases.[123] Block exemptions also benefit the Member States, since they

121. Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid.
122. Sinnaeve 1999, p. 212.
123. As is mentioned in the SAAP (para. 35), block exemptions are based on the principle that State aid control should set clear 'positive' and 'negative' priorities.

reduce the administrative costs.[124] And since there is no standstill-obligation with respect to aid that falls under the block exemption, recipient undertakings will receive their aid more speedily.

The Commission has adopted several block exemption regulations on the basis of the Enabling Regulation.[125] Those regulations concern areas[126] in which the Commission has gained sufficient experience to define general compatibility criteria. In 2008, the Commission adopted the General Block Exemption Regulation (GBER). This is one single regulation that replaced the previous block exemption regulations.[127] The range of exemptions was also broadened by this Regulation. The GBER should be seen against the background of the State aid Action Plan (SAAP), in which the Commission aimed at a better prioritisation through simplification and consolidation of the block exemptions.[128] In 2014, as part of the State aid Modernisation (SAM), the Commission adopted a revised GBER.[129] This revised GBER greatly extended the possibilities for Member States to grant "good aid" without prior Commission scrutiny.

The GBER should not be confused with the *De minimis* Regulation.[130] Aid that falls under the scope of the *De minimis* Regulation is deemed not to meet all the criteria of Article 107(1) TFEU, whereas aid that falls under the scope of the GBER is considered compatible with the common market (in the sense of Article 107(3) TFEU). So in the first case, there is no aid, while in the second case, there is aid, but it is compatible (and therefore authorised). The effect of both regulations, however, is the same: namely the measure does not have to be notified.

2.4.4 Concluding remarks

The present section has shown that there are exceptions to the prohibition of State aid. Indeed, State aid can be implemented when it is declared compatible by the Commission. As will be explained in the following chapters, in almost all bank State aid cases, the Commission declared the aid measures to be compatible with the internal market.

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124. Deiberova & Nyssens 2009, p. 27.
125. Regulations (EC) Nos 68/2001, 70/2001, 2204/2002 and 1628/2006.
126. Such as aid in favour of SME's, training aid and aid for R&D.
127. General Block Exemption Regulation, para. 4.
128. SAAP, para. 35-38.
129. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.
130. Both Regulations are aimed at achieving a better targeted enforcement and monitoring (see SAAP, para. 52). Both Regulations have the same legal base (i.e. the Enabling Regulation).

2.5 State aid procedure

In the previous sections, the *substantive rules* on State aid have been discussed. The present section discusses the *procedural rules*. Article 107 TFEU contains the substantive State aid rules, whereas Article 108 TFEU deals with the procedural issues. The procedural rules are not only laid down in Treaty provisions. Several regulations have been adopted that contain detailed procedural rules. The most important of these regulations is Council Regulation No 659/1999 of 22 March 1999, also known as the Procedural Regulation.[131] Before the adoption of the Procedural Regulation, the only procedural rules were the ones laid down in the predecessors of Article 108 TFEU.[132] The procedural rules were clarified in the decisional practice of the Commission and the case-law from the Court. The purpose of the Procedural Regulation was to codify this practice.[133] In 2015, the Council adopted Council Regulation (EU) No 2015/1589 of 13 July 2015, which replaced the Procedural Regulation from 1999. For this reason, I will speak of the 1999 Procedural Regulation and the 2015 Procedural Regulation.

The 2015 Procedural Regulation sets out four types of State aid procedures: i) new aid, ii) unlawful aid, iii) misuse of aid, and iv) existing aid. These procedures will be discussed in the following subsections.

2.5.1 New aid

In case of new aid[134], the Member State has two obligations. Firstly, it has to notify the aid measure to the Commission.[135] Secondly, the Member State is subject to a standstill clause: it may not put the aid measure into effect until the Commission has authorised the aid measure.[136]

131. Amended by Council Regulation (EC) No 1791/2006 of 20 November 2006, Council Regulation (EU) No 517/2013 of 13 May 2013 and Council Regulation (EU) No 734/2013 of 22 July 2013. In addition, in 2009, the Commission adopted the Enforcement Notice, the Notice on a Simplified Procedure, and the Code of Best Practices.
132. It has therefore been argued that the Procedural Regulation was “long overdue”. See: Sinnaeve & Slot 1999, p. 1153.
133. Preamble 2.
134. In Article 1(c), ‘new aid’ is defined as “all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid”. This is a residual definition. ‘Existing aid’ has been defined in Article 1(b) of the Procedural Regulation.
135. Pursuant to Article 2 of the Procedural Regulation.
136. Pursuant to Article 3 of the Procedural Regulation.

The State aid procedure with respect to new aid consists of two phases: a preliminary investigation procedure and a formal investigation procedure. The procedure always starts with the preliminary investigation. The formal investigation is only initiated when there are doubts as to the compatibility of the notified aid measure with the common market.

The preliminary investigation procedure
When new aid has been notified, the Commission will launch the preliminary investigation procedure. According to settled case-law, the preliminary stage of the procedure for reviewing aid under Article 108(3) is intended merely to allow the Commission to form a prima facie opinion of the partial or complete conformity with the Treaty of the aid schemes notified to it.[137] On the basis of Article 4 of the Procedural Regulation, the Commission can take the following decisions:
– *Article 4(2):* The Commission finds that the notified measure does not constitute aid. In this case, it shall record that finding by way of a decision.
– *Article 4(3):* The Commission finds that no doubts are raised as to the compatibility of the notified measure with the common market. In this case, it shall decide that the aid measure is compatible with the common market. This decision is referred to as a 'decision not to raise objections'.
– *Article 4(4):* The Commission finds that doubts are raised as to the compatibility of the notified measure with the common market. In this case, the Commission shall initiate the formal investigation procedure. This decision is referred to as an 'opening decision'.
– *Article 4(6):* The Commission does not take a decision within two months. In this case, the aid shall be deemed to have been authorised by the Commission.

The formal investigation procedure
The formal investigation procedure is laid down in Article 108(2) TFEU and Article 6 of the Procedural Regulation. The formal investigation procedure is only initiated if the Commission has doubts as to the compatibility of the notified aid measure with the common market.

The Court has held that the formal investigation procedure is "essential whenever the Commission has *serious difficulties* in determining whether an aid is compatible with the common market. The Commission may thus restrict itself to the preliminary examination under Article 108(3) when taking a decision in favour of an aid only if it is able to satisfy itself after an initial examination that the aid is compatible with the Treaty. If, on the other hand, an initial examination leads the Commission to the opposite conclusion, or does not

137. Case C-99/98, para. 32; Case 84/82, para. 12-12; Case 120/73, para. 3.

enable it to overcome all the *difficulties* involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 108(2)."[138]

On the basis of Article 9 of the Procedural Regulation[139], the Commission can take the following decisions:
– *Article 9(2):* The Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid.
– *Article 9(3):* The Commission finds that the doubts as to the compatibility of the notified measure have been removed. This decision is referred to as a 'positive decision'.
– *Article 9(4):* The Commission attaches conditions to a positive decision. This decision is referred to as a 'conditional decision'.
– *Article 9(5):* The Commission finds that the notified aid is not compatible with the common market. This decision is referred to as a 'negative decision'.

A key feature of the formal investigation procedure is the possibility to attach conditions to the authorisation of the aid measure. The Commission can only take a conditional decision in the formal investigation stage.

2.5.2 Unlawful aid

In the previous subsection, it was established that Member States are required to notify new aid. However, it is conceivable that a Member State grants aid without notifying the Commission. This can be case when a Member State wants to avoid Commission control. However, there does not necessarily have to be bad intent. For instance, the Member State can be of the opinion that the measure does not constitute aid and that it therefore does not have to be notified.

If a Member State grants aid without notifying the Commission, then there is unlawful aid. Article 1(f) of the Procedural Regulation gives the following definition of 'unlawful aid': 'unlawful aid' is new aid put into effect in contravention of Article 108(3) TFEU.[140] *Unlawful* aid should not be confused with *incompatible* aid. Incompatible aid is aid that falls under the prohibition of

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138. Case C-225/91 (Matra v Commission), para. 33.
139. Article 9 of Regulation No 2015/1589 corresponds to Article 7 of Regulation No 659/1999.
140. Article 1(f) of Regulation No 659/1999.

Article 107(1) and that is not declared compatible in the sense of Article 107(2) or 107(3). Incompatible aid concerns substantive rules, whereas unlawful aid concerns procedural rules.

The Commission is obliged to examine whether unlawful aid is compatible with the common market. Before taking a decision on the compatibility of the aid, the Commission can adopt an injunction. Three types of injunctions are possible: i) an information injunction[141], ii) a suspension injunction[142] and iii) a recovery injunction[143].

The procedure regarding unlawful aid is similar to that of new aid. This means that this procedure also can consist of two stages: a preliminary investigation procedure and a formal investigation procedure (which is only initiated if the Commission chooses to).[144] In contrast to the procedure regarding new aid, the Commission is with respect to unlawful aid not bound by the time-limit set out in Articles 4(5), 7(6) and 7(7).[145] Another difference is that the above-mentioned injunctions are not possible in the procedure regarding new aid.

On the basis of Article 16 of the Procedural Regulation[146], the Commission can take a recovery decision when it considers the unlawful aid to be incompatible. The Commission is however bound by general principles of EU law: Article 16 provides that the Commission shall not require recovery if this would be contrary to a general principle of EU law.[147]

2.5.3 Misuse of aid

In Article 1(g) of the Procedural Regulation, 'misuse of aid' is defined as aid used by the beneficiary in contravention of a decision taken pursuant to Article 4 (3) or Article 9(3) or 9(4) of the Procedural Regulation. These provisions refer to: i) the decision not to raise objections, ii) the positive decision and iii) the conditional decision. The result of these decisions is that the aid measure is declared compatible with the common market. The aid measure is authorised for a certain purpose. If, after the aid measure has been authorised, the Member State decides to use the aid for a different purpose, then there is misuse of aid within the meaning of Article 1(g).

141. Article 10(3) of the 1999 Procedural Regulation.
142. Article 11(1) of the 1999 Procedural Regulation.
143. Article 11(2) of the 1999 Procedural Regulation.
144. For a detailed discussion of the enforcement possibilities in case of unlawful aid, see: Adriaanse 2006.
145. Article 13(2) of the 1999 Procedural Regulation.
146. Article 16 of Regulation No 2015/1589 corresponds to Article 14 of Regulation No 659/1999.
147. See: Rzotkiewicz 2013.

The procedure regarding misuse of aid is laid down in Article 20 of the Procedural Regulation. This Article provides that the Commission may, in cases of misuse of aid, initiate the formal investigation procedure. [148]

2.5.4 Existing aid

All existing aid[149] is kept under constant review by the Commission.[150] According to Article 21 of the Procedural Regulation, Member States have to submit information on all existing aid schemes to the Commission.

2.5.5 Interested parties

Strictly speaking, the State aid procedure is a procedure between the Commission and the Member State concerned.[151] However, State aid may affect many other economic actors; such as the beneficiary undertaking, competing undertakings and other Member States. Some of these actors fall under the definition of "interested party".[152] And as a consequence, they have certain rights in the State aid procedure: they can submit comments and complaints.

The rights of interested parties are laid down in Article 24 of the Procedural Regulation. Article 24(1) provides that, once the Commission has taken the decision to initiate the formal investigation procedure, an interested party may submit comments. It is worth stressing that this "right to be heard" only applies to the formal investigation procedure. Only then is the Commission obliged to allow the undertakings concerned to submit their comments. As the Court has pointed out in its case-law, there is no such obligation in the preliminary investigation procedure.[153]

148. In the case of Caixa Geral de Depositos (SA.35062, 18 December 2012), the Commission considered that the breach of a dividend ban constituted misuse of aid. Another example is the case of the Latvia bank 'Parex banka'. Latvia had committed that the bank would divest the Wealth Management Business within a certain deadline. However, the divestment did not take place within the agreed deadline. This constituted a breach of the terms of the Parex Final Decision and hence a misuse of the aid granted. The Commission therefore opened the formal investigation procedure (Parex banka, SA.36612, 16 April 2014, para. 60).
149. 'Existing aid' is defined in Article 1(b) of the Procedural Regulation.
150. Article 108(1) TFEU.
151. Niejahr and Scharf (2008, p. 365) call it a "bilateral procedure". This means that the beneficiary of the aid is considered to be a third party. In practice, however, the beneficiary and the Member State concerned can team up.
152. Interested party is defined in Article 1(h) of the Procedural Regulation as "any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations".
153. Case C-225/91 (Matra), para. 52-53.

Pursuant to Article 24(2) of the Procedural Regulation, any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. This involvement of interested parties is important to the effectiveness of State aid control. The Commission has investigatory powers; it can conduct inquiries on its own initiative. This is one way to detect unlawful aid or misuse of aid. Another way to detect unlawful aid is when interested parties, such as competitors, inform the Commission about unlawful aid. The fact that complaints are ‘an essential source of information for detecting infringements of the EU rules on State aid’ has been recognised by preamble 13 of Regulation 734/2013 (i.e. the Regulation that amended the 1999 Procedural Regulation).

2.5.6 Concluding remarks

While the present section set out the procedural rules relating to the different types of aid (new aid, unlawful aid, misuse of aid and existing aid), the procedure relating to new aid is the most important in this PhD-study. Indeed, all beneficiary banks were concerned by this procedure, while there are only a few cases of misuse of aid and unlawful aid.

Moreover, the present section explained the relevant distinction between the preliminary investigation procedure and the formal investigation procedure. The relevance of this distinction will become apparent in section 3.7.3, which discusses the distinction between commitment decisions (taken in the context of the preliminary investigation procedure) and conditional decisions (taken in the context of the formal investigation procedure).

2.6 Conclusion

The present chapter provided a basic background of State aid. It has shown that State aid exists in various forms and ways. The present chapter focussed on State aid *in general*, whereas the next chapter focusses specifically on State aid *to banks*.

Chapter 3. State aid to banks

3.1 Introduction

While the previous chapter focussed on State aid in general, this chapter specifically focusses on State aid *to banks*. Why this special focus on banks? In essence, the special focus on banks is due to two specific features of the banking sector: banks are *essential to the economy* and banks are *special*. These two specific features of the banking sector explain why State aid to banks might be justified. These two features will be explored in section 3.2, while section 3.3 and 3.4 discuss how the two specific features of the banking sector are taken into account by the Member States respectively the Commission. In other words: sections 3.3 and 3.4 set out how the Member States and the Commission responded to the financial crisis.

Roughly speaking: the topic of this PhD-study is State aid to banks. More specifically, the topic of this PhD-study is *the Commission's assessment* of State aid to banks. The last three sections of the present chapter introduce some key features of this assessment.[1] Firstly, section 3.5 provides an overview of the various steps in the Commission's assessment of bank State aid measures.[2] Secondly, the Commission's assessment of bank State aid measures is laid down in its decisions. In order to analyse the Commission decisions, it is essential to understand how the decisions are built up and what types of decisions there are. To that end, section 3.6 provides a basic overview of the decisions. Finally, since the restructuring measures play a key role in the Commission's assessment of bank State aid measures, section 3.7 provides a basic overview of these structural and behavioural measures.

1. In that regard, these three sections are essential building blocks for chapter 6 (in which the framework of analysis is set out) and chapters 7 to 13 (in which the actual analysis of the Commission decisions takes place).
2. The relevance of this overview will become apparent in chapter 6, which sets out the structure of the chapters 7 to 13.

3.2 The economics of State aid to banks

3.2.1 Why banks are essential

Banks play an essential role in the economy. In the language of the Bank Recovery and Resolution Directive (which will be discussed in the next chapter), banks perform "critical functions", such as safeguarding deposits, managing payments systems, providing loans and channelling capital for investment and innovation.

The banking sector can be described as the "lubricating oil"[3] of the real economy: if the real economy were a machine, then the banking sector is a way to ensure that the economy operates smoothly. This illustrates the importance of the banking sector to the overall economy. By lending credit, banks are the facilitators of the real economy.[4]

This can be explained as follows. In economic terms: there are surplus units (households and firms with spare funds) and deficit units (households and firms in need of funds). There are essentially two ways to raise funds: direct financing and indirect financing.[5] In case of direct financing, there is a direct relation between the lender and borrower: the lender has a claim on the borrower. One could think of securities such as shares or bonds. Financial markets play an important role here, because securities are traded on the financial markets. In case of indirect financing, the lender does not have a claim on the borrower, but on an intermediary, while the intermediary has a claim on the borrower.

Banks are financial intermediaries: by granting loans to deficit units (borrowers) and by taking deposits from surplus units (lenders), they bring together the demand and supply of capital. Borrowers and lenders usually have different preferences. As a result, the desired characteristics of the loans will be different from the desired characteristics of the deposits. Banks therefore have to fulfil a transformation function.[6] The preferences of borrowers and lenders differ with respect to maturity, size and risk. As a consequence, three types of transformation can be distinguished: maturity transformation, size transformation[7] and risk

3. See, for instance: Lyons 2009, p. 29.
4. In that regard, Schillig (2013, p. 754) argued that banks perform a quasi-utility function. About the crucial role of the banking sector, see also: Broekhuizen 2016, p. 50-51; Savvides & Antoniou 2009, p. 355-358; Lo Schiavo 2013, p. 151.
5. Direct financing and indirect financing are both forms of external financing. A firm can also use its own profits to finance new activities. This is called internal financing. See: Van Ewijk & Scholtens 1999, p. 38.
6. Van Ewijk & Scholtens 1999, p. 68-69.
7. Usually, the size of the deposits is smaller than the size of the loans. The reason is that most surplus units only have a limited amount of money to deposit, while deficit units often need a large amount of money. Think of an individual who wants to buy a house or a firm which wants to finance its business activities. Banks intermediate by 'transforming' several of those small deposits into one large loan.

transformation.[8] Of these three, maturity transformation is the most important. The importance of maturity transformation follows from the fact that deficit units (borrowers) usually want a loan for a longer period, while surplus units (lenders) want to be able to immediately withdraw money from their accounts. In other words: lenders and borrowers have different preferences with respect to the maturity. Banks intermediate between surplus units and deficit units by lending long and borrowing short. Loans can have a maturity of many years, while deposits are often withdrawable on demand.

The core function of banks is financial intermediation.[9] Banks bring together supply and demand for capital. However, besides this indirect financing, firms can rely on direct financing, which takes place at the capital market. For instance, firms can issues shares or bonds. From this perspective, banks and the capital market compete.[10] However, it should be pointed out that banks also have a role in direct financing, since they often assists firms that opt for direct financing. Banks are 'facilitators of capital market transactions'.[11] Banks perform functions such as underwriting and market making. In that regard, instead of making a profit from receiving interest on loans, banks make a profit from the fees that they charge for their services.[12]

To conclude, banks are the facilitators – the "lubricating oil" – of the real economy. This explains why the banking sector is so essential. Another specific feature of the banking sector is that banks are 'special'; this will be explained in the following subsection.

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8. Borrowers need capital to finance activities that may be risky, while lenders deposit their money because they do not want to take risk. Borrowing is risky, because deficit units have a risk of defaulting in their repayment. Because of intermediation, lenders no longer have a claim on the borrowers; instead, they have a claim on the bank that operates as intermediary. Claims on the bank (i.e. deposits) are usually less risky than claims on borrowers. Because of diversification, the default risk of banks is lower than the default risk of individual companies.
9. It should be noted that not all banking activities are performed by banks. Sometimes, other entities – such as money market funds, investment funds or securitisation vehicles – conduct banking activities. These entities are part of the so-called 'shadow banking sector'. While there is no uniform definition, 'shadow banking' is usually defined as credit intermediation that takes place outside the regular banking system.
10. This raises the question why there is a need for financial intermediaries such as banks. The traditional answer to this question lies in the existence of market imperfections. In the economic literature, several arguments have been proposed in order to explain the need for financial intermediaries. Those arguments mainly rely on the following two market imperfections: transaction costs and information asymmetries. Banks – as intermediaries – can reduce the transaction costs, because they can exploit economies of scale and economies of scope.
11. Scholtens & Van Wensveen 2003, p. 28.
12. Van Ewijk & Scholtens 1999, p. 115.

3.2.2 Why banks are special

Banks are ‘special’ in the sense that they are different from non-financial firms. In the first place, banks are characterised by a high leverage. A high leverage means that the amount of equity is very low compared to the amount of debt. It has been observed that the banking sector is the sector with the highest leverage.[13] In this respect, banks are different from other firms. In the second place, banks have a large balance sheet compared to non-financial firms. It has been remarked that “the size of the largest banks dwarfs that of the largest non-bank business”.[14]

But most importantly, banks are more interlinked and more interconnected than non-financial firms. This interconnectedness may create systemic risk. Systemic risk is sometimes related to banks that are too-big-to-fail, too-complex-to-fail or too-interconnected-to-fail. It can be argued that in a crisis situation, every bank has systemic relevance.[15] The failure of one bank may have dramatic repercussion for other banks. In other words: bank failure is contagious. This goes by many names: contagion effect[16], domino-effect[17], spill-over effect or systemic risk. Thus, the failure of a bank can have a negative effect on financial stability. Why is bank failure so contagious? This is due to the following reasons.[18]

Interbank lending
There are direct linkages between banks. This is because banks lend to each other. In other words: banks hold claims on each other.[19] If a bank fails and goes into insolvency, then it is no longer able to honour its claims. Consequently, the banks that have claims on the failing bank have to write down their claims.[20] This is a form of direct contagion.

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13. Commission Staff Working Paper 2011, p. 25; Vickers Interim Report 2011, p. 64.
14. Quigley 2012, p. 2.
15. This will be discussed in more detail in section 7.6.
16. See, for instance: Beck et al. 2010, p. 11.
17. See, for instance: Savvides & Antoniou 2009, p. 348; Hellwig 2009, p. 182.
18. These reasons are not only discussed in the literature on (bank) State aid, but can also be found in the literature on financial regulation (as the rationale for financial regulation is related to the fact that bank failure is contagious). See, for instance: Brunnermeier et al. 2009, p. 3-5.
19. Beck et al. 2010, p. 11; Amelio & Siotis 2009, p. 4.
20. Hellwig 2009, p. 182.

Fire-sales
Another connection between banks is related to the fact that banks usually hold similar assets.

If a troubled bank needs funding – and is unable to get enough wholesale funds – it has to sell assets quickly. This may lead to a fall in asset prices. This might depress the value of similar assets held by other banks. This could turn into a negative spiral.[21]

Confidence
The failure of one bank may trigger a loss of confidence in other banks. Indeed, as a result of the failure of a bank, investors might become worried about the viability of other banks, either because they perceive the other banks as similar to the failed bank or because they expect that the other banks will be affected through the direct linkages with the failed bank.[22] Thus, the failure of one bank may trigger a loss of confidence in other banks.[23]

Such a loss of confidence can have dramatic repercussions. This is because confidence is crucial to the banking sector. Banks are dependent on confidence; this is their 'Achilles heel'.[24] Because of their business model (lending long and borrowing short), access to short-term funding is crucial to banks. This makes it highly important for a bank to retain the confidence of its creditors.[25]

The most extreme form of a loss of confidence in a bank is a bank run by its depositors. However, because of deposit guarantee schemes, bank runs by depositors are not very likely to happen.[26] Nonetheless, deposit guarantee schemes do not mitigate the risk of a 'modern' bank run. In that regard, it should be noted that banks are sometimes dependent on the money market and interbank market.[27] The funds obtained on these markets are not insured by deposit guarantee schemes. Accordingly, when investors on these markets lose confidence in a bank, then they are likely to withdraw their funds.

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21. Beck et al. 2010, p. 12; Heremans & Pacces 2012, p. 573; Lyons & Zhu 2011, p. 3; Maes & Kiljanski 2009, p. 13; Schooner & Taylor 2010, p. 42-45.
22. With respect to the first situation, it has been remarked that the public does not differentiate adequately among individual banks. See: Psaroudakis 2012, p. 198.
23. This form of contagion is sometimes referred to as "information(al) contagion". See, for instance: Beck et al. 2010, p. 11; Brunnermeier et al. 2009, p. 3; Commission Staff Working Paper 2011, p. 25; Hellwig 2009, p. 182.
24. Bovenzi, Guynn & Jackson 2013, p. 38.
25. As Hüpkes (2005) points out, *under normal circumstances*, the maturity mismatch does not pose a problem, but it makes banks particularly vulnerable to a loss of public confidence.
26. Heremans & Pacces 2012, p. 572; Schooner & Taylor 2010, p. 27.
27. In the interbank market, banks borrow and lend funds among each other on a short-term, often unsecured, basis (Schooner & Taylor 2010, p. 28).

Because of the essential role of confidence, the fall of one bank can result in the fall of other banks. And even if the failure of one bank does not lead to a complete downfall of other banks, it may still create problems for those other banks. A bank may face higher funding costs: if investors lose confidence in a bank, then they perceive an investment in that bank to be more risky. Subsequently, they would demand a higher return. In other words: the bank faces higher funding costs.[28]

To conclude, because of the interconnectedness of the banking sector, bank failure may be contagious. This particular feature of the banking sector makes banks 'special' (as compared to non-financial firms).

3.2.3 The justification for State aid to banks

In Chapter 2, the motives for granting State aid were discussed. A distinction was made between the efficiency objective of State aid and the equity objective of State aid. In the case of State aid to banks, the efficiency objective provides the main justification for granting State aid. During the financial crisis, granting State aid to banks was necessary; not just to rescue one bank, but to rescue the entire financial system. This follows from the fact that bank failure is contagious – as was explained in subsection 3.2.2. In addition, as explained in subsection 3.2.1, banks are essential to the economy. For these two reasons, granting State aid to banks may be justified. In that regard, it has been remarked that "the overall public interest is at stake, not just a private one".[29] In other words: the social costs of a bank failure exceed the private costs.[30] In economic terms: a bank failure constitutes a negative externality.[31] This provides a justification for granting State aid.

3.3 State aid measures in support of banks

For the reasons set out in the previous section, Member States decided that they could not allow 'their' banks to fall and therefore rescued the ailing banks by means of State aid. These rescue operation were conducted in various ways, which illustrates that there are several types of State aid measures. The various measures to support (ailing) banks are described in the following subsections.

28. Doleys (2012, p. 558) remarks that "investor sensitivities led to a dramatic increase in the cost of capital".
29. Sutton, Lannoo and Napoli 2010, p. 2.
30. Beck et al. 2010, p. 10; Commission Staff Working Paper 2011, p. 25.
31. Beck et al. 2010, p. 10; Brunnermeier et al. 2009, p. 3; Commission Staff Working Paper 2011, p. 25; Gerard 2013, p. 2.

3.3.1 Guarantees

Banks need funding. For an ailing bank, it may be difficult to attract new funding, because an ailing bank is not an attractive investment for many investors. During the financial crisis, even healthy banks faced difficulties in attracting new funding. A guarantee (scheme[32]) can help overcome this problem, because a guarantee (scheme) provides a safety net to investors. In this way, a guarantee (scheme) can contribute to the revival of the interbank lending market and of the financial markets in general. A guarantee (scheme) thus allows the beneficiary banks to refinance themselves.

3.3.2 Bond loan scheme

Another liquidity enhancing measure is a bond loan scheme.[33] Such a scheme ensures that banks have sufficient access to liquidity. The functioning of this scheme can be explained as follows. Banks obtain funds on the money market. Important participants on the money market are other banks and the ECB.[34] A distinction can be made between uncollateralised/unsecured lending and collateralised/secured lending.[35] Collateralised lending often takes the form of a repurchase agreement.[36] Collateralised lending can also take the form of a loan that is granted against assets that are pledged as collateral.[37] Not all assets can be used as collateral. The ECB has certain eligibility criteria with respect to the collateral. Banks not having assets that can be used as collateral may have problems of obtaining funds on the money market. This may create liquidity problems for those banks. These liquidity problems are solved by the

32. A guarantee can be given ad hoc or in the context of a scheme. Under a guarantee scheme, (eligible) banks usually have the option to enter into an agreement with the State, which in turn would guarantee the banks' new issuance of debt instruments in exchange for a fee.
33. Greece introduced a 'Bond Loan Scheme' and Cyprus introduced a 'Special government bonds scheme'. The Polish scheme comprised State Treasury bonds related support measures.
34. The ECB monetary policy operations can be divided into open market operations and standing facilities. Open market operations can be divided into i) main refinancing operations (MRO), ii) longer-term refinancing operations (LTRO), iii) fine-tuning operations (FTO), and iv) structural operations. Standing facilities can be divided into the marginal lending facility and the deposit facility. Either the ECB conducts a repurchase agreement or it grants a loan against assets pledged as collateral.
35. As a general rule, unsecured lending will be more expensive than secured lending.
36. ECB, The monetary policy of the ECB, Frankfurt am Main 2011, p. 42.
37. Other forms of secured lending are Covered Bonds and Asset Backed Securities (ABS). See: Alink & Aarts 2013.

bond loan scheme, in which the State lends government bonds to the beneficiary banks.[38] These government bonds can be used as collateral in interbank transactions and as collateral in refinancing transactions or marginal lending facilities of the ECB. The temporary acquisition of the bonds allow the beneficiary banks to obtain liquidity from the money market. As the Commission explained in its decisions on these bond loan schemes, the economic effect of a bond loan scheme is similar to that of a guarantee.[39]

3.3.3 Recapitalisation

Capital is important, because it is a 'cushion' or 'buffer' that can be used to absorb losses. Capital requirements ensure that banks have enough loss-absorbing capacity. A higher capital buffer would increase the "distance to default". Regulatory capital not only includes equity, but also hybrid securities. A distinction can be made between Tier 1 capital and Tier 2 capital.[40] Tier 1 capital is "going concern" capital, while Tier 2 capital is "gone concern" capital. These terms refer to the fact that Tier 1 capital is used to absorb losses in a going concern situation, whereas Tier 2 capital is intended to be used in a situation in which the bank is liquidated.[41]

A recapitalisation means that the State injects capital into the bank.[42] This capital injection can be in the form of ordinary shares, preference shares or some hybrid capital instruments. A capital injection ensures that the beneficiary bank is in compliance with regulatory capital requirements.

3.3.4 Nationalisation

In several cases, ailing banks were nationalised by the Member States concerned. The nationalisation itself does not constitute State aid. Nevertheless, nationalisation is usually achieved by means of a recapitalisation – which does constitute State aid.

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38. In exchange for the temporary acquisition of the bonds, the beneficiary banks have to pay a fee to the government. In addition, they have to provide collateral. The assets that are provided as collateral will probably be of such a quality that they will not be accepted by other banks (or other money market participants) as collateral.
39. Greece – N560/2008, para. 81. The fee is therefore calculated in the same way as the guarantee fee.
40. Before the introduction of CRD IV, there was also a category know as Tier 3 capital. This category was repealed by CRD IV. Tier 1 capital consists of Common Equity Tier 1 capital (CET) and Additional Tier 1 capital (AT). The CRR sets out in detail the criteria that capital instruments have to meet in order to qualify as CET, as AT and as Tier 2. These criteria are laid down in Art. 26 to 50, 51 to 61 and 62 to 71 CRR respectively.
41. Joosen 2010a, p. 186, footnote 27.
42. A capital injection can be performed ad hoc or in the context of a scheme.

3.3.5 Underwriting

An underwriting commitment can also constitute a State aid measure. This is illustrated by the case of the four large Greek banks (Alpha Bank, NBG, Piraeus Bank and Eurobank). In 2015, these banks planned to conduct a capital raising exercise. The Hellenic Financial Stability Fund (HFSF) would act as a backstop: it committed to provide the amount of capital needed in case it was not provided by private investors in the framework of the capital increase.[43]

3.3.6 Asset relief measures

During the financial crisis, the market value of many assets fell dramatically. As a result, many banks had 'impaired assets' on their balance sheets. In order to remove market uncertainty and to revive market confidence, Member States have undertaken measures to relieve banks from their impaired assets. A distinction can be made between an asset *guarantee* and an asset *purchase*. An asset purchase means that the State effectively purchases the impaired assets from the bank. An asset guarantee is a form of insurance: the State commits to bear some of the losses on the impaired assets. An important feature of an asset guarantee is that the insured assets remain on the balance sheet of the beneficiary bank, while an asset purchase means that the impaired assets are hived off the balance sheet. However, in both cases, the downside risk is removed from the bank's balance sheet.[44]

3.3.7 Facilitating a transfer of (part of) the beneficiary bank

When a beneficiary bank cannot continue as a viable standalone entity, the Member State may choose to facilitate the transfer of (parts of) the beneficiary bank to another larger bank. In such a case, the value of the transferred assets usually exceeds the value of the transferred liabilities – the difference is the so-called 'funding gap'. By covering this funding gap, the Member State facilitates the transfer and thus the rescue of (parts of) the beneficiary bank.

3.3.8 Controlled winding-up

The objective of a controlled winding-up is to support value preservation in failing banks.[45] Value is preserved by means of a controlled winding-up on a going concern basis instead of the bank being subjected to regular bankruptcy

43. Alpha Bank, 26 November 2015, para. 18-19.
44. Consequently, both types of impaired assets measure lead to a decrease of the bank's RWA.
45. See, for instance, Danish winding-up scheme, N 407/2010, 30 September 2010, para. 3.

proceedings.[46] In the context of a financial crisis, the market conditions are not very favourable for assets disposals: a swift sale of assets would thus be at an excessive discount and would not reflect the real value of the assets.[47] State aid may be needed to keep the bank afloat whilst it is wound-down. This usually amounts to liquidity support. For instance, the Slovenian State granted Probanka a liquidity facility. In that context, the Slovenian State granted a State guarantee on newly issued debt. This guarantee was issued to allow Probanka to draw a direct emergency loan (emergency liquidity assistance) from the Bank of Slovenia.[48]

3.3.9 Liquidity assistance by central banks

Central banks may act as a lender of last resort (LOLR)[49] by providing emergency liquidity assistance (ELA).[50] Within the Eurozone, the decision to grant ELA is at the discretion of the national central bank[51], but the ECB can veto a decision to grant ELA.[52] This raises the question whether ELA can be considered as a national measure.[53] Another question is whether ELA constitutes State aid. This question was answered by the Commission in its decision on Northern Rock.[54] The Commission held that liquidity assistance does not constitute State aid, if the following cumulative conditions are met:

i) the financial institution is *solvent* at the moment of the liquidity provision and the latter is not part of a larger aid package,
ii) the facility is fully *secured by collateral* to which haircuts are applied, in function of its quality and market value,
iii) the central bank charges a *penal interest rate* to the beneficiary,
iv) the measure is taken at the central bank's own initiative, and in particular is *not backed by any counter-guarantee of the State*.

46. This description was used to describe the objective of the Danish winding-up scheme (SA.33001, 28 June 2011, para. 6). See also Roskilde Bank, 5 November 2008, para. 23.
47. N407/2010, Danish winding-up scheme, 30 September 2010, para. 36.
48. Probanka, 18 December 2013, para. 13.
49. The LOLR-function of central banks is discussed by, inter alia: Campbell & Lastra 2009; Schooner & Taylor 2010, p. 53-56; Tucker 2014.
50. In one of its decisions (Panellinia Bank, 16 April 2015, para. 39), the Commission described ELA as follows: "ELA is an exceptional measure enabling a solvent financial institution, facing temporary liquidity problems, to receive Eurosystem funding without such an operation being part of the single monetary policy."
51. ELA is provided by the national central bank at its own risk.
52. By a (two thirds) qualified majority of its Governing Council according to art. 14.4 of the ECB Statute.
53. This question is discussed by Psaroudakis (2012, p. 215-217).
54. Northern Rock, 5 December 2007, para. 31-34.

These four cumulative conditions were codified in point 51 of the 2008 Banking Communication and reprised in point 62 of the 2013 Banking Communication.[55]

As a final remark, it should be noted that the ordinary activities of central banks relating to monetary policy, such as open market operations and standing facilities, fall outside the scope of the State aid rules.[56]

3.4 State aid control since the financial crisis

All State aid measures have to be approved by the Commission before they can be implemented. With respect to State aid to banks, there are two competing interests: preserving competition on the one hand and preserving financial stability on the other hand. A balance must be struck between these two competing interests. The current section describes how the Commission has sought to achieve this balance.

3.4.1 The Crisis Framework

State aid to firms in difficulty is normally assessed under the Rescue and Restructuring-guidelines (the "R&R-guidelines"). Accordingly, the first few State aid banking cases were assessed under these R&R-guidelines.[57] However, the R&R-guidelines were not appropriate in a crisis situation, because they did not take into account the systemic effects of a bank failure. Therefore, on 13 October 2008, the Commission adopted the Banking Communication. This was the first of several Communications in which the Commission provided guidance. The other Communications were the Recapitalisation Communication, the Impaired Assets Communication and the Restructuring Communication. Together, these Communications constitute the Crisis Framework.[58] In addition, the Commission adopted the First Prolongation Communication, followed by the Second Prolongation. As the name of these Communications indicate, these Communication prolonged the Crisis Framework. In 2013, the

55. Point 62 of the 2013 Banking Communication changes the first cumulative condition: it is now required that the bank is *temporarily illiquid* but solvent at the moment of the liquidity provision.
56. Point 51 of the 2008 Banking Communication.
57. The Commission applied the R&R-guidelines that were in force at that time. In 2014, the Commission adopted new guidelines on rescue and restructuring aid; these are referred to as the "2014 R&R-guidelines".
58. In a few decisions, the Commission used the term "Crisis Communications". See, for instance, Alpha Bank, 26 November 2015, para. 74. Also the 2013 Banking Communication speaks of "Crisis Communications".

Commission adopted a new Banking Communication (the "2013 Banking Communication") which replaced the original Banking Communication (now referred to as the "2008 Banking Communication").

3.4.1.1 The 2008 Banking Communication

On 13 October 2008, the Commission adopted the Banking Communication.[59] The purpose of this Communication was to provide guidance on compatibility of recapitalisation and guarantee schemes. The Banking Communication set out the general principles. First of all, the Commission justified why it had chosen Article 107(3)(b) TFEU as the appropriate legal basis.[60] The Commission stressed that the exceptional nature of the crisis – in which the entire functioning of financial markets was jeopardised – might require exceptional measures. Article 107(3)(b) TFEU was therefore an appropriate legal basis.

Secondly, the Banking Communication introduced a distinction between fundamentally sound banks and distressed banks.[61] The Commission recognised that – due to the exceptional nature of the crisis – even fundamentally sound banks experienced problems. Fundamentally sound (efficient) banks and distressed (inefficient) banks were both affected by the crisis. Therefore, a distinction should be made between banks whose problems have an exogenous cause and banks whose problems have an endogenous cause. An exogenous cause means that the bank – although it has an efficient business model and strategy – has gotten into difficulty because of the exceptional nature of the crisis. An endogenous cause means that the bank has got into difficulty because of its own inefficient business model or risky strategy. In this case, a far-reaching restructuring is required.[62]

Thirdly, the Banking Communication reiterated the general principle that aid should be well-targeted, proportionate and limited to the strict minimum.[63] In other words: any aid measure should be appropriate, necessary and proportionate.[64]

59. Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8-14.
60. Points 6 to 13 of the 2008 Banking Communication.
61. Point 14 of the 2008 Banking Communication.
62. In another Communication, the Commission introduced a threshold of 2% to differentiate between fundamentally sound and distressed banks.
63. Point of the 2008 Banking Communication.
64. The terms "appropriate, necessary and proportionate" cannot be found explicitly in (point 15 of) the 2008 Banking Communication, but since these terms are used in every bank State aid decision, I will use these terms rather than the terminology of (point 15 of) the 2008 Banking Communication.

After introducing these general principles, the Banking Communication provided specific guidance relating to guarantees, recapitalisation measures, controlled winding-up and liquidity assistance. These specific principles concerned, for instance, the eligibility criteria to the scheme, the material and temporal scope of the aid measure, and the need for behavioural safeguards (such as restrictions on commercial conduct). These specific principles determined whether a State aid measure could be considered appropriate, necessary and proportionate. For that reason, these specific principles will be discussed in chapter 8 of this PhD-study, since that chapter covers the Commission's assessment of the appropriateness, necessity and proportionality of State aid measures.

3.4.1.2 The Recapitalisation Communication

Although the Banking Communication provided some guidance regarding recapitalisation measures, there was a need for further guidance. Therefore, on 5 December 2008, the Commission adopted the Recapitalisation Communication.[65] The purpose of the Recapitalisation Communication is to provide detailed guidance as to whether specific forms of recapitalisation are compatible with the common market.[66] First, the Recapitalisation Communication sets out the common objectives of recapitalisation measures, the possible competition concerns and the recommendations of the Governing Council of the ECB. The second part of the Recapitalisation Communication discusses the specific principles that govern the different types of recapitalisation. In essence, the Recapitalisation Communication is mainly about the pricing of capital injections. In that regard, the Recapitalisation Communication mentions several elements that should be taken into account by Member States when determining the remuneration for State recapitalisations. The remuneration is of key importance to the assessment of the proportionality of recapitalisation measures. Therefore, the guidance provided in the Recapitalisation Communication on the remuneration will be discussed in chapter 8 of this PhD-study.

At this place, it is worth noting that the Recapitalisation Communication distinguishes between fundamentally sound banks and other banks. Banks that are not fundamentally sound are subject to stricter requirements: for these banks, a restructuring plan is required.[67]

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65. Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C 10, 15.1.2009, p. 2-10.
66. Point 3 of the Recapitalisation Communication.
67. Points 43 and 44 of the Recapitalisation Communication.

3.4.1.3 The Impaired Assets Communication

On 26 March 2009, the Commission adopted a Communication that deals with asset relief measures: the "Impaired Assets Communication" (often referred to as "IAC").[68] In the IAC, the Commission clarifies the rationale of asset relief as a measure to safeguard financial stability and underpin bank lending. The Commission recognises that uncertainty about the valuation and location of assets lead may lead to a credit crunch.[69] The main purpose of asset relief measures is therefore to boost market confidence. The IAC contains guidelines on the application of State aid rules to asset relief measures. The IAC will be discussed extensively in chapter 9 of this PhD-study.

3.4.1.4 The Restructuring Communication

The fourth Communication of the Crisis Framework was the Restructuring Communication[70], adopted on 22 July 2009. Member States have to submit a restructuring plan or a viability plan. The Restructuring Communication contains detailed provisions regarding the restructuring plan.[71] The Restructuring Communication is based on three pillars: restoration of long-term viability of the bank, burden sharing, and minimisation of competition distortion.

Return to long-term viability
Long-term viability implies that State aid is redeemed over time, or is remunerated according to normal market conditions.[72] Long-term viability requires that the bank is able to survive without any State support.[73] Pursuant to the Restructuring Communication, the relevant Member State should demonstrate how the bank will restore long-term viability. The Restructuring Communication contains detailed provisions on the information that a restructuring plan should contain. First of all, the restructuring plan should include a comparison with alternative options. Secondly, the restructuring plan should contain a diagnosis of the causes of the bank's difficulties. Thirdly, it should contain

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68. Communication from the Commission on the treatment of impaired assets in the Community banking sector, OJ C 72, 26.3.2009, p. 1-22.
69. Points 6 and 7 of the Impaired Assets Communication.
70. Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.8.2009, p. 9-20.
71. Only section 2 of the Restructuring Communication applies to cases in which Member States should submit a viability plan. Sections 3, 4 and 5 of the Restructuring Communication are not applicable to viability plans; they only apply to restructuring plans.
72. Point 14 of the Restructuring Communication.
73. Point 53 of the Impaired Assets Communication.

information about the business model. This includes information on the organisational structure, funding, corporate governance, risk management, asset-liability management, cash-flow generation, off-balance sheet commitments, leveraging, current and prospective capital adequacy and the remuneration incentive structure.[74] The business model should be feasible. The feasibility is analysed by the Commission with a stress test. The expected results of the planned restructuring are to be tested under different scenarios (base case scenario and stress case scenario). The annex of the Restructuring Communication provides a model restructuring plan. The Restructuring Communication further provides that the restructuring period should be as short as possible: the maximum duration of a restructuring plan is five years.[75]

NB: The principle of restoring long-term viability will be discussed in depth in chapter 11 of this PhD-study.

Burden-sharing (own contribution)

The bank and its capital holders should contribute to the restructuring costs as much as possible.[76] This is necessary in order to limit distortions of competition and moral hazard. The R&R-guidelines already stipulated that 'the amount and intensity of aid must be limited to the strict minimum of the restructuring costs necessary to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs'.[77] Unlike the R&R-guidelines, the Restructuring Communication does not require a specific threshold for the own contribution.[78]

NB: The principle of burden-sharing will be discussed in depth in chapter 12 of this PhD-study.

Limiting competition distortions

Since State aid creates competition distortions, measures are needed to limit these competition distortions. These measures are usually referred to as "compensatory measures". Section 3.7.1 gives a general overview of these compensatory measures. The Restructuring Communication stresses that compensatory measures should be tailor-made.[79] The Communication identifies two main criteria that determine the nature and form of the compensatory measures: 1) the amount of aid and the conditions and circumstances under which the aid was granted, and 2) the characteristics of the market on which the beneficiary bank will operate.[80]

74. Point 11 of the Restructuring Communication.
75. Point 15 of the Restructuring Communication.
76. Point 22 of the Restructuring Communication.
77. R&R-guidelines, para. 43.
78. Point 24 of the Restructuring Communication.
79. Point 30 of the Restructuring Communication.
80. Point 30 of the Restructuring Communication.

NB: The principle of limiting competition distortions will be discussed in depth in chapter 13 of this PhD-study.

3.4.1.5 The First Prolongation Communication

The four Communications described in the previous subsections constitute the Crisis Framework. One of the most essential characteristics of the Crisis Framework is that – due to the exceptional nature of the crisis – Article 107(3)(b) TFEU was chosen as a legal basis. This provision allows State aid 'to remedy a serious disturbance in the economy of a Member State'. The Banking Communication stresses that recourse to Article 107(3)(b) TFEU is only possible as long as the crisis situation justifies its application.[81] This highlights the temporary nature of the crisis framework. The Restructuring Communication even had a specified expiry date. It was due to expire on 31 December 2010.[82]

On 7 December 2010, the Commission adopted the (First) Prolongation Communication. This Prolongation Communication recognised that there were still tensions in the financial markets and that the economic outlook was uncertain. In addition, the Prolongation Communication recognised the high level of interconnectedness and interdependence within the financial sector.[83] This justified the maintaining of the possibility for Member States to have recourse to crisis-related support measures on the basis of Article 107(3)(b) TFEU. Thus, the Prolongation Communication provided that the Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication would remain in place.[84] Furthermore, the Prolongation Communication provides that the temporal scope of the Restructuring Communication should be extended to 31 December 2011.[85]

Apart from extending the temporal scope of the Crisis Framework, the Prolongation Communication also introduced some changes to the Crisis Framework. Thus far, the Crisis Communications made a distinction between fundamentally sound and distressed banks.[86] The Prolongation Communication removed this distinction.[87] The financial situation had improved slightly, so the Commission held that banks should face fewer difficulties in raising capital on the market.[88] The distinction was mainly important for the question whether the

81. Point 12 of the 2008 Banking Communication.
82. Point 49 of the Restructuring Communication.
83. Point 6 of the First Prolongation Communication.
84. Point 7 of the First Prolongation Communication.
85. Point 7 of the First Prolongation Communication.
86. Point 14 of the 2008 Banking Communication.
87. Points 12 to 16 of the First Prolongation Communication.
88. Point 13 of the First Prolongation Communication.

bank had to submit a restructuring plan. The removal of the distinction means that as of 1 January 2011, every bank (both fundamentally sound and distressed banks) which benefit from a new recapitalisation or an impaired asset measure should submit a restructuring plan.[89] The requirement to submit a restructuring plan still only applies to structural measures (i.e. recapitalisation and asset relief) and not to aid in the form of guarantees.[90]

3.4.1.6 The Second Prolongation Communication

One year after the First Prolongation Communication, the Commission issued a Second Prolongation Communication. Pursuant to this Prolongation Communication, the Banking, Recapitalisation and Impaired Assets Communications will remain in place beyond 31 December 2011 and the Restructuring Communication is extended beyond 31 December 2011.[91] Unlike the previous Communications, the Second Prolongation Communication did not set a specific expiry date.

In addition to extending the temporal scope of the Crisis Framework, the Second Prolongation Communication refined the pricing principles regarding capital injections and guarantees – as will be discussed in section 8.6. The Second Prolongation Communication also introduced the "proportionate assessment" – which will be discussed in section 10.5.

3.4.1.7 The 2013 Banking Communication

In July 2013, the Commission updated the Crisis Framework by adopting the 2013 Banking Communication. This Communication replaces the 2008 Banking Communication and supplements the other Crisis Communications.[92]

<u>Recapitalisation and impaired asset measures</u>
One of the most important changes introduced in the 2013 Banking Communication concerns the restructuring procedure. Under the 2008 Banking Communication, recapitalisation measures and asset relief measures were temporarily approved as rescue aid, while the in-depth analysis of the aid measures was postponed to the restructuring stage. The final authorisation of the aid measures depended on the restructuring plan. In the 2013 Banking Communication, the Commission departed from this approach. Following the 2013

89. Point 14 of the First Prolongation Communication.
90. Point 16 of the First Prolongation Communication.
91. Point 4 of the Second Prolongation Communication.
92. For a general overview of the 2013 Banking Communication, see: Flynn 2014.

Banking Communication, the Commission will authorise recapitalisation measures as restructuring aid only after agreement on the restructuring plan has been reached.[93] In other words: the "clear-first-ask-questions-later approach" has been abandoned with the 2013 Banking Communication. The reason for this change in approach is that the market conditions had changed and that there was less need for an immediate approval of aid measures.[94]

Temporary approval of recapitalisation measures and asset relief measures as rescue aid is still possible under the 2013 Banking Communication.[95] However, this is only possible in exceptional circumstances: the emergency recapitalisations or impaired assets measures must be absolutely necessary to preserve financial stability. The Communication further requires that the competent supervisory authority should confirm that there is an exceptional risk to financial stability that cannot be averted by any other less distorting measures. So only in those exceptional circumstances is the "clear-first-ask-questions-later approach" maintained. Once the emergency measures are authorised as rescue aid, the Member State has two months to submit a restructuring plan.

Member States should submit a capital raising plan before or as part of the restructuring plan. The capital raising plan should contain 1) capital raising measures, 2) burden-sharing measures and 3) safeguards preventing the outflow of funds from the bank.[96]

Capital raising measures

The beneficiary bank should identify capital raising measures, such as rights issues, voluntary conversion of subordinated debt instruments into equity, capital-generating sales of assets, or earnings retention.[97]

Burden-sharing

The 2013 Banking Communication introduced stricter burden-sharing requirements.[98] Shareholders, hybrid capital holders and subordinated debt holders should contribute to reducing the capital shortfall. There are two main ways in

93. Point 34 of the 2013 Banking Communication.
94. This new procedure is welcomed by Lienemeyer, Kerle & Malikova (2014, p. 284). They argue that "banks announce their restructuring plan (sale of Robeco, major cost cutting in the case of Rabobank) *at the same time* of their private capital raising, and not after it. The purpose is to give long term visibility to the investors before they commit to investing in the bank. The Member State should not accept to have less information when committing State resources."
95. Points 50 to 53 of the 2013 Banking Communication.
96. Point 32 of the 2013 Banking Communication.
97. Point 35 of the 2013 Banking Communication.
98. Lienemeyer, Kerle & Malikova (2014) also highlight the enhanced burden-sharing under the 2013 Banking Communication.

which hybrid capital holders and subordinated debt holders can contribute: either by converting their debt into Common Equity Tier 1 or by writing down the principal of their instruments.[99] State aid may not be granted before equity, hybrid capital and subordinated debt have fully contributed to offset any losses.[100] In essence, the Banking Communication introduces some form of a "bail-in". However, it is not a general bail-in by all bank creditors, because the Commission does not require contributions from senior debt holders.

The reason to introduce this bail-in was to make an end to the diverging approaches to burden-sharing across Member States.[101] In the early stages of the financial crisis, Member States did not require creditors to contribute to rescuing banks. However, as the crisis developed, some Member States introduced stricter ex ante burden-sharing requirements. Diverging approaches to burden-sharing can lead to differences in funding costs. As a consequence, the level playing field may be undermined.

Points 45 and 46 are also of importance. Point 45 provides for an exception to the burden-sharing requirements. In point 46, the 'no creditor worse off principle' is enshrined.

Preventing outflow of funds

The outflow of funds prior to the restructuring decision must be prevented.[102] A bank that knows that it has a capital shortfall is not allowed to pay dividend, repurchase its shares or buy back hybrid capital instruments.[103] If a bank nonetheless pays dividend or repurchases shares, then the Commission will, for the purpose of establishing the required measures to limit distortion of competition, add an amount equivalent to the outflow to the aid amount.[104] As a result, the Commission may impose stricter remedies.

Covering the residual capital shortfall with restructuring aid

The 2013 Banking Communication is based on the idea that all capital generating measures should be exhausted before restructuring aid can be granted in the form of recapitalisation or impaired asset measures.[105] Only the residual capital shortfall may be covered with restructuring aid.[106] The residual capital shortfall is the capital shortfall that remains after the capital raising measures and burden-sharing measures have been implemented.

99. Point 41 of the 2013 Banking Communication.
100. Point 44 of the 2013 Banking Communication.
101. Points 17 and 18 of the 2013 Banking Communication.
102. Point 47 of the 2013 Banking Communication.
103. Point 47 of the 2013 Banking Communication.
104. Point 48 of the 2013 Banking Communication.
105. Point 19 of the 2013 Banking Communication.
106. Point 49 of the 2013 Banking Communication.

Guarantees and liquidity support

The 2013 Banking Communication also contains rules regarding guarantees and liquidity support. These aid measures can still be temporarily approved as rescue aid. This means that those aid measures can be granted before the Commission has approved the restructuring plan. However, this is only possible for banks that have no capital shortfall.[107] If a bank with a capital shortfall needs liquidity support, the Commission will apply the procedure concerning recapitalisation, which means that the Member State has to submit a restructuring plan.

3.4.2 What is special about the Crisis Framework?

The Crisis Framework is special in the sense that it takes into account the specificities of the banking sector. By contrast, the Rescue and Restructuring-guidelines (R&R-guidelines) – that the Commission originally applied – do not take into account the systemic effects of a bank failure. As was explained in section 3.2, bank failure can be contagious. During the crisis, Member States supported banks not just to rescue one bank, but to rescue the entire banking sector. This makes the State aid to banks different from 'normal' rescue and restructuring aid.[108] For this reason, the Commission adopted the Crisis Framework.

The adoption of the Crisis Framework is special in two ways. On the one hand, the introduction of the Crisis Framework underlined that the Commission continued to apply State aid rules to the banking sector. It had been argued by some that State aid control should be suspended altogether for the duration of the crisis.[109] However, instead of completely suspending the State aid rules, the Commission adapted the State aid rules for the banking sector. It has been remarked that "the pragmatism and flexibility shown by the Commission in adjusting its approach to fit the circumstances may well have avoided a more serious undermining of State aid antitrust law through widespread non-compliance".[110]

107. Point 58 of the 2013 Banking Communication.
108. Not all authors agree with the specificity of the banking sector. For instance, D'sa (2009, p. 144) questions the specificity of the banking sector (and thus the need to create a special framework).
109. Mamdani 2012, p. 242; Botta (2016, p. 269) describes how in 2008 the French president Sarkozy put forward a proposal to exempt crisis aids form the scope of State aid control. Since unanimity was required and not all Member States agreed, this proposal was not accepted.
110. Da Silva & Sansom 2009, p. 31. See also: Gebski 2009, p. 95; Reynolds, Macrory & Chowdhury 2011, p. 1679.

On the other hand, the adoption of the Crisis Framework constitutes a relaxation of the State aid rules. Although the Crisis Framework is largely based on the principles of the 2004 R&R-guidelines[111], there are several differences between them.[112] In that regard, the Crisis Communications have been described as "quite permissive"[113], "more flexible"[114], "accommodating"[115] and a "marked liberalization".[116] The Crisis Communications are more flexible than the 2004 R&R-guidelines on the following aspects:

The "one time, last time principle"

Point 72 of the R&R-guidelines provides that rescue aid should only be granted once. This is known as the "one time, last time-principle". In the crisis framework, the Commission departed from this "one time, last time-principle". Point 7 of the Restructuring Communication stipulates that provision of additional aid during the restructuring period should remain a possibility if justified by reasons of financial stability.[117] As a consequence, a bank can be aided several times.

The own contribution

The Commission requires a significant own contribution from the beneficiary bank. The R&R-guidelines contain several thresholds: for small enterprises, the contribution should be at least 25%; for SME, the contribution should be

111. On 31 July 2014, the Commission adopted the "Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty". As the name suggests, these R&R-Guidelines do not apply to financial institutions. This is because financial institutions are covered by specific rules, i.e. the 2013 Banking Communication and the other Crisis Communications.

112. In some decisions, the Commission has made an effort to explain why a deviation of the R&R-Guidelines was needed. See for instance the decision in case WestLB, C43/2008, 12 May 2009, para 63: "However, the nature and the scale of the present crisis call for further specific elements related to the current market conditions to be taken into account. Therefore the principles of the R&R Guidelines have to be modulated when applied to the restructuring of WestLB in the present crisis."

113. Nicolaides & Rusu 2010, p. 767.

114. Lo Schiavo 2013, p. 142.

115. Nicolaides & Rusu 2010, p. 768.

116. Flynn 2014, p. 670.

117. This principle is reiterated in points 16 and 27 of the Restructuring Communication. Point 16 reads as follows: "Should further aid not initially foreseen in the notified restructuring plan be necessary during the restructuring period for the restoration of viability, this will be subject to individual ex ante notification and any such further aid will be taken into account in the Commission's final decision." However, this does not rule out the possibility to grant emergency aid prior to the notification of an amended restructuring plan. This is the case when urgent remedial action is needed to keep the ailing bank afloat. See for instance: WestLB, 7 October 2009. The Commission considered that in such cases a commitment to provide an amended restructuring plan within six months or less should be sufficient.

at least 40%; and for large firms, the contribution should be at least 50%. As banks are large firms, the R&R-guidelines would require an own contribution of at least 50%. Unlike the R&R-guidelines, the Crisis Framework does not stipulate a specific threshold for the own contribution.

The restructuring period

Another relaxation concerns the timeframe. In the Crisis Framework, the restructuring period (i.e. the period in which a bank has to return to viability) is extended to five years.[118] This is a relaxation, because the normal time frame is two to three years.[119]

State aid procedure

The Crisis Framework not only amounted to substantive changes, it also changed the procedure.[120] Under the R&R-guidelines, the Member States could not implement the aid measures until the Commission had approved the aid measures. The aid measures were subject to a full ex ante review. This process could take some time (usually several months). The R&R-guidelines provided for a simplified procedure[121], but even this procedure could take 1 month. In a financial crisis, it is of the utmost importance that Member State can act quickly.[122] The need for immediate approval of State aid measures was recognised by the Commission. Indeed, the 2008 Banking Communication stressed that "the Commission has taken appropriate steps to ensure the *swift adoption of decisions* upon complete notification, if necessary *within 24 hours and over a weekend*".[123] As set out in the previous subsection, the procedure (under the 2008 Banking Communication) was as follows: recapitalisation measures and asset relief measures were temporarily approved as rescue aid, while the in-depth analysis of the aid measures was postponed to the restructuring stage. This approach has been described as "clear first, ask questions later".[124]

118. Point 15 of the Restructuring Communication.
119. See footnote 2 of point 15 of the Restructuring Communication.
120. Doleys 2012, p. 556.
121. See point 30 of the 2004 R&R-guidelines.
122. In essence, there are three moments: i) the moment of notification of the aid measures to the Commission, ii) the moment of authorization of the aid measures by the Commission, and iii) the moment of implementation of the aid measures. Ideally, the moment of implementation should be after the moment of authorization. However, in several cases, Member States have implemented the aid measures before gaining authorization by the Commission. This constitutes a breach of article 108(3) TFEU.
123. Point 53 of the 2008 Banking Communication.
124. Ahlborn & Piccinin 2010b, p. 140.

3.4.3 The legal status of the Communications

The Communications can be characterised as "soft law": they are not binding on Member States. They are, however, binding on the Commission. In that regard, the CJEU has held the following:

> "Where the Commission adopts guidelines intended to specify, consistently with the Treaty, criteria which it intends to apply in the exercise of its discretion, there is a self-imposed limitation of that discretion in that it is obliged to comply with the guiding rules which it imposed on itself. It may not depart from those guidelines in an individual case without giving reasons that are compatible with the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified".[125]

In another case, the CJEU clarified that the Communications are not binding on the Courts of the European Union.[126] This once more underlines that the Communications are "soft law".

It is worth stressing that despite their soft law character, the Communications are nonetheless authoritative. Indeed, although the Communications are not binding on Member States, they do influence the behaviour of Member States.[127] It has even been remarked that the Communications *de facto* have the same binding power as formal laws or regulations.[128]

The legal status of the 2013 Banking Communication was one of the issues in case C-526/14. The "Ustavno sodišče" (i.e. the Constitutional Court of Slovenia) asked for a preliminary ruling. Advocate-General Wahl held that the referring court asked in essence whether the Banking Communication should be considered as de facto binding on the Member States.[129] The Advocate-General recalled that in the field of State aid control, the Commission has no general

125. T-104/13, para. 184.
126. "Although the Commission must observe the principle of the protection of legitimate expectations when it applies its self-imposed guidelines, that principle cannot bind the Courts of the European Union in the same way, in so far as they do not propose to apply a specific method of setting the amount of fines in the exercise of their unlimited jurisdiction, but consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations." T-82/13, para. 168.
127. As noted by Doleys (2012, p. 553), the use of soft law provides a "politically-palatable way to address government behaviour". See also: Sutton, Lannoo & Napoli 2010, p. 31.
128. Soltész & Von Köckritz 2010, p. 289.
129. Opinion in case C-526/14 (Kotnik), para. 32.

legislative power: “This means that the Commission is not empowered to lay down general and abstract binding rules governing, for example, the situations in which aid may be considered compatible because it is aimed at remedying a serious disturbance in the economy of a Member State under Article 107(3)(b) TFEU. Any such body of binding rules would be null and void”.[130]

3.4.4 Temporary Framework for the real economy

As a response to the financial crisis, the Commission not only created the Crisis Framework, it also adopted the Temporary Framework for the real economy. While the Crisis Framework deals specifically with financial institutions, the Temporary Framework was targeted at the real economy. The purpose of the Temporary Framework was to unblock bank lending and to ensure continued access to finance. The financial crisis not only had an impact on the financial sector; the real economy was also heavily affected. Due to the credit crisis, banks became risk-averse. This created problems for the real economy. Not only weak companies, but also creditworthy companies faced sudden problems in gaining access to finance. Especially SME’s faced such difficulties. Besides short-term effects, the Commission also identified long-term effects: if companies experience problems in their access to finance, then they may postpone or abandon investment projects. This is especially harmful if it concerns investments in sustainable growth or environmental friendly projects.

The Commission identified the need for temporary State aid measures. At the same time, the Commission identified the need for a coordinated action to ensure a level playing field. The Commission therefore adopted the Temporary Framework for the real economy. Just like the Crisis Framework, the Temporary Framework was based on Article 107(3)(b) TFEU. As the name ‘Temporary Framework’ indicates, it is a *temporary* framework. The original Temporary Framework expired in December 2010. However, it was prolonged until 31 December 2011. This New Temporary Framework expired in December 2011.

Since this PhD-study is about State aid *to banks*, the Temporary Framework is of no relevance to this PhD-study. Accordingly, the Temporary Framework will not be discussed further.

130. Opinion in case C-526/14, para. 37.

3.5 The Commission's assessment of bank State aid

3.5.1 The steps in the Commission's assessment

It is worthwhile to unravel the various steps in the Commission's assessment of State aid measures. Although the Commission does not label the steps, as I see it, there are five steps:

- In the first place, it has to be assessed whether a certain aid measure constitutes State aid within the meaning of Article 107(1) TFEU.
- In the second place – when the measure constitutes State aid – it has to be assessed whether the compatibility of the State aid measure should be assessed on the basis of Article 107(3)(b) TFEU (and thus on the basis of the Crisis Framework).
- In the third place – when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment – it has to be assessed whether the State aid meets the cumulative criteria of appropriateness, necessity and proportionality. NB: in the specific case of an asset relief measure, the measure has to comply with the criteria of the Impaired Assets Communication.
- In the fourth place – when the State aid is appropriate, necessary and proportionate – it has to be assessed whether a restructuring plan is required for the beneficiary bank.
- In the fifth place – when a restructuring plan is required – it has to be assessed whether the restructuring plan achieves long-term viability, burden-sharing and the limitation of competition distortions.

3.5.2 The outcome of the Commission's assessment

In most cases, the aid measures were authorised as compatible State aid. Thus, the conclusion at the first step of the assessment is often that the aid measures constitute State aid within the meaning of Art. 107(1) TFEU. The conclusion at the third step of the assessment is often that the aid measures are appropriate, necessary and proportionate. The conclusion at the fifth step of the assessment is often that the restructuring plan is appropriate to enable the bank to restore its long-term viability, sufficient in respect to burden-sharing and appropriate to limit the competition distortions.

Thus, in most cases, the outcome of the Commission's assessment is that – in light of the restructuring plan – the aid measures constitute compatible State aid. In a few cases, however, the outcome is different. Since the assessment comprises five stages, the outcome of the assessment can be different in five ways.

In the first place, the outcome of the assessment could be that the aid measures do not constitute State aid within the meaning of Art. 107(1) TFEU. Indeed, there are a few cases in which the Commission concluded that the aid measures did not constitute State aid within the meaning of Art. 107(1) TFEU. This was the case in: Dexia BIL, the Italian securitisation scheme (10 February 2016) and the Hungarian Asset Management Company "MARK" (10 February 2016).

In the second place, the outcome of the assessment could be that the compatibility of the State aid measures should not be assessed on the basis of Article 107(3)(b) TFEU. This outcome would mean that in those cases, the Crisis Framework is not used as the assessment framework. However, as will be explained in section 7.6, in all bank State aid cases, the Commission concluded that Article 107(3)(b) TFEU – and thus the Crisis Framework – formed the basis of the compatibility-assessment.

In the third place, the outcome of the assessment could be that the cumulative criteria of appropriateness, necessity and proportionality are not met. However, it can be observed that the Commission never concluded that the aid was not appropriate, necessary or proportionate. Although there are a few cases in which the Commission concluded that the aid was incompatible, the incompatibility was due to the restructuring plan (i.e. the fifth step of the assessment), rather than due to the nature of the aid (i.e. the third step of the assessment). Indeed, as will be explained in section 8.1.4, the Commission was quite lenient at the third step, while being quite strict at the fifth step of the assessment. For this reason, I am of the opinion that the fifth step of the assessment is more important than the third step.[131]

In the fourth place, the outcome of the assessment could be that no restructuring plan is required. As will be explained in chapter 10, there are a few instances in which no restructuring plan is required (for instance, when the bank only benefits from a guarantee scheme). However, in most other instances, the Member State has to submit to the Commission a restructuring plan for the beneficiary bank.

In the fifth place, the outcome of the assessment could be that, in light of the restructuring plan, the aid is not compatible. In the cases of Banco Privado Portugues, Banco Tercas and ARCO, the Commission came to the conclusion that the aid was not compatible. In these cases, the Commission adopted a

131. This has some implications for the focus and structure of this PhD-study. As will be explained in section 6.9, there are three chapters (i.e. chapters 11, 12 and 13) that address the second stage, while only one chapter (i.e. chapter 8) addresses the first stage.

Recovery Decision. Interestingly, these three cases arrived at the Court of Justice. Indeed, as discussed in chapter 5, the beneficiary banks and Member States in these three cases decided to challenge the Recovery Decision.

3.6 The Commission decisions

An important part of this PhD-study is the analysis of the Commission decisions in State aid cases. This makes it worthwhile to explain how the decisions are built-up.

3.6.1 Type of decisions

There are several types of decisions in a State aid procedure. In chronological order, the following types of decisions can be distinguished:

Rescue Decision
As was explained in section 3.4.1, the Commission used to follow a two-step approach: first the aid was temporarily approved as rescue aid; later followed by an assessment of the restructuring plan. With the introduction of the 2013 Banking Communication, this two-step approach was abandoned for recapitalisation and impaired asset measures. However, most bank State aid decisions were taken before the adoption of the 2013 Banking Communication. Consequently, most bank State aid cases started with a Rescue Decision. In the Rescue Decision, the Commission would assess whether the aid was appropriate, necessary and proportionate. If these three criteria were met, the aid measure was temporarily approved for a period of six months.[132]

In section 2.5, the State aid procedure was explained. A Rescue Decision corresponds to a 'decision not to raise objections' within the meaning of Art. 4 (3) of the Procedural Regulation.

Opening Decision
In some cases, an Opening Decision is adopted. By this type of decision, the Commission opens the formal investigation procedure laid down in Article 108 (2) TFEU. This procedure is initiated when the Commission has doubts as to the compatibility of the aid. This type of decision is taken on the basis of Art. 4 (4) of the Procedural Regulation.

132. Within those six months, the Member State had to submit a restructuring plan.

Prolongation Decision
Sometimes, the formal investigation procedure is prolonged; in these cases, a Prolongation Decision is adopted.

Restructuring Decision
In a Restructuring Decision, the Commission assesses the compatibility of the aid measure in light of the restructuring plan. In particular, the Commission assesses whether the three restructuring objectives are met: in the first place, the restructuring plan should ensure the restoration of long-term viability of the bank; in the second place, the restructuring plan should ensure burden-sharing; in the third place, the restructuring plan should mitigate the competition distortions.

It should be noted that sometimes, a restructuring plan provides for the liquidation of the bank.[133] In such a case, the restructuring plan is usually called a ‘liquidation plan’. Accordingly, the restructuring decision is referred to as a liquidation decision. The compatibility-assessment of liquidation aid is not really different from the assessment of restructuring aid. Admittedly, the 2013 Banking Communication contains a section that specifically addresses liquidation aid. Nevertheless, point 70 of the 2013 Banking Communication stipulates that the principles for the assessment of restructuring aid apply *mutatis mutandis* to the assessment of liquidation aid.[134] Since a liquidation plan is essentially a restructuring plan, this PhD-study uses the term ‘restructuring plan’ and ‘restructuring decision’.

Depending on whether the Commission has initiated the formal investigation procedure, the Restructuring Decision is taken on the basis of Art. 4 or on the basis of Art. 9 of the Procedural Regulation.[135] If the Restructuring Decision directly follows the Rescue Decision, then it corresponds to a ‘decision not to raise objections’ within the meaning of Art. 4(3) of the Procedural Regulation. If, on the other hand, the Restructuring Decision follows an Opening Decision, then it is taken on the basis of Art. 9 of the Procedural Regulation. In this case, the Restructuring Decision is either a ‘positive decision’, a ‘conditional decision’ or a ‘negative decision’.[136]

133. See, for instance: HGAA, 3 September 2013, para. 13.
134. In addition, point 78 of the 2013 Banking Communication requires that sections 3.1.2 and 3.1.3 must be complied with *mutatis mutandis*.
135. NB: Article 4 and Article 9 of Regulation No 2015/1589 correspond to Article 4 and Article 7 of Regulation No 659/1999.
136. See section 2.5.

Amendment Decision

In principle, the Restructuring Decision is the final decision. However, in several bank State aid cases, the Commission was requested by the Member State to amend the Restructuring Decision. In the Amendment Decision, the Commission assesses whether the requested amendments are acceptable.

It should be recalled that in the Restructuring Decision, the State aid is declared compatible in light of the commitments (or conditions – in case of a conditional decision). A very common commitment is the commitment to divest certain subsidiaries. Sometimes, the beneficiary bank experiences difficulties when implementing the commitments. For instance, due to deteriorating market circumstances, the bank may find it difficult to divest the subsidiary within the stipulated timeframe. In such a situation, the Member State may request the Commission to amend the Restructuring Decision. An amendment is only possible on the basis of a *sufficiently reasoned request* from the Member State. Furthermore, the failure to implement the commitment within the stipulated timeframe should be due to external factors. In other words: there should be *no fault of the bank*.[137]

Several amendments are possible. In the first place, the Member State can request an *extension of the (divestment) deadline*. In that regard, the Commission has held that, although it is not explicitly provided for in the Procedural Regulation, the Commission has discretion to allow an extension as long as it does not impede the enforcement of the Restructuring Decision.[138]

In the second place, the Member State can request a *modification of the commitment*. To give an example: in case of a divestment commitment, the Member State may propose to change the divestment commitment into a commitment to run-down the subsidiary.[139] An important precondition is that the modification does not entail any additional aid. Furthermore, the modification should be based on new commitments which are equivalent to those originally provided.[140]

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137. For instance, Royal Bank of Scotland (RBS) had committed to divest its Rainbow Business. The Amendment Decision describes how RBS genuinely tried to divest Rainbow within the timeline. RBS started marketing Rainbow immediately after the Restructuring Decision and subsequently signed a sale agreement with Santander UK. However, Santander UK pulled out from the agreed purchase. For this reason, RBS missed the divestment deadline. The Commission considered that RBS could not be blamed for missing the divestment deadline.
138. Sparkasse KolnBonn, 30 March 2011, para. 12. Some Restructuring Decisions expressly provide for the possibility to extend the divestment deadline. See, for instance: KBC, 18 November 2009, para. 89.
139. This occurred in the cases of Commerzbank, KBC and Ethias.
140. Ethias, 12 June 2014, para. 67.

3.6.2 Structure of the decisions

The decisions are usually built up in the same way. A Restructuring Decision often contains the following sections:

1. *Procedure*
2. *Description*
   a. *The beneficiary bank*
   b. *The events triggering the aid measure*
   c. *The aid measure*
   d. *The restructuring plan*
3. *Position of the Member State*
4. *Assessment by the Commission*
   a. *Existence of State aid*
   b. *Compatibility of the aid*
5. *Compliance of the aid measure with the intrinsically linked provisions of the BRRD*
6. *Conclusion*

Annex

3.6.3 Language of the decisions

As to the language of the decisions, most decisions are in English.[141] The normal rule is that the decisions are drafted in the language of the Member State. However, because of the exceptional nature of the financial crisis and the need for a quick response, in many cases the Member States have agreed that the Commission can draft its decisions in English. Most decisions contain a phrase like "Denmark has *exceptionally* agreed that the authentic language for this decision should be English" or "For reasons of urgency, the Greek authorities *exceptionally* accept that the Commission decision be adopted in the English language". So with respect to decisions in bank State aid cases, the exception has become the rule.

3.6.4 Confidential information in the decisions

Some information is regarded as confidential. This information is therefore omitted in the published versions of the decision.[142] Sometimes, the information is completely deleted (and replaced by a few dots between square brackets) and

141. A few decisions are not available in English. For instance, the Restructuring Decision of 12 May 2010 in the case of Carnegie Investment Bank (NN18/2010) is only available in the Swedish language.
142. Pursuant to Art. 24 and 25 of the 1999 Procedural Regulation/Art. 30 and 31 of the 2015 Procedural Regulation.

sometimes (between square brackets) a range is given in order to allow a non-confidential approximation of the figure. Normally, the removal of confidential information means the removal of one word. However, in some cases, entire paragraphs are treated as confidential.[143]

Which information is usually considered as confidential? If an ailing bank is sold through a tender procedure, the identity of the acquiring bank is of course mentioned in the State aid decision. However, the identity of other banks that have expressed an interest in acquiring (parts of) the ailing bank, is not always revealed in the State aid decision.[144]

3.7 The structural measures and behavioural constraints

One of the key features of bank State aid cases is that the Commission requires structural measures and behavioural constraints. These measures are aimed at ensuring that the State aid is proportionate (first stage of the compatibility-assessment) and at restoring long-term viability, ensuring burden-sharing and limiting competition distortions (second stage of the compatibility-assessment).

3.7.1 Overview of the structural measures and behavioural constraints

In the literature, the Commission's approach towards bank State aid has been applauded and criticised. Most authors agree that the Commission was successful in the sense that it avoided a financial meltdown. Nevertheless, there was some criticism. In particular, the structural measures and behavioural constraints have attracted a lot of criticism. With respect to certain behavioural restraints, it has been argued in the literature that "the medicine may be more harmful than the illness".[145] All structural measures and behavioural constraints will be touched upon in this PhD-study, but the most prominent ones will be introduced below:

<u>Price leadership ban</u>
One of the most prominent behavioural restrictions is the price leadership ban. A price leadership ban (sometimes referred to as a non-price leadership commitment) means that the beneficiary bank is not allowed to offer the best price on the market. The rationale of this behavioural restriction is that State aid may not be used to finance aggressive pricing strategies.

143. See, for instance, Bradford&Bingley, 25 January 2010, para. 57.
144. See, for instance: AB Ukio Bankas, 14 August 2013, para. 14-20.
145. Da Silva & Sansom 2009, p. 30.

A criticism is that by imposing price leadership bans in a concentrated market, the Commission makes the non-recipient bank de facto price leader.[146] It has been argued that price leadership bans undermine the competitive process.[147] It limits limiting the beneficiary bank's ability to compete and thus softens its rivals' incentives to compete.[148]

Acquisition ban
Another prominent behavioural restriction is the acquisition ban. An acquisition ban means that the beneficiary bank is not allowed to acquire stakes in other banks. This is in line with point 23 of the Restructuring Communication (according to which the restructuring aid should be limited to covering costs which are necessary for the restoration of viability) and points 39 and 40 of the Restructuring Communication (according to which State aid must not be used to the detriment of competitors which do not enjoy similar public support).

Remuneration restrictions
Many bank State aid cases are characterised by remuneration restrictions. Remuneration restrictions usually entail that the remuneration of the bank's senior management will be restricted. This make State aid less attractive. This – in turn – weakens the incentive to apply for State aid; and it strengthens the incentive to repay State aid as soon as possible. In the literature, it has been argued that remuneration restrictions can be counterproductive, because it could induce good and capable managers to leave the beneficiary bank.[149] This would harm the return to viability of the bank.

Divestments
While price leadership bans, acquisition bans and remuneration restrictions are examples of behavioural restrictions, divestments are a structural remedy. Divestments are a form of *burden-sharing* by the beneficiary bank. They are also a form of *downsizing* of the beneficiary bank.

A criticism raised in the literature is that many divestments concern foreign markets rather than the domestic market, which might undermine the cohesion of the internal market.[150]

146. See: Schinkel 2012; De Kok 2015.
147. Lyons & Zhu 2012, p. 64.
148. Ahlborn & Piccinin 2010, p. 55.
149. Heimler & Jenny 2012, p. 364; see also: Beck et al. 2010, p. 53.
150. Drijber & Burmester 2009, p. 582. See, however, also: Nicolaides & Rusu 2010, p. 780-781.

Monitoring Trustee and Divestiture Trustee
How to ensure that the restructuring measures are implemented correctly? To that end, a *monitoring trustee* is appointed in most bank State aid cases. The monitoring trustee monitors the implementation of the restructuring measures and submits a report to the Commission. These regular reports allow the Commission to verify that the restructuring plan is implemented properly.

3.7.2 Terminology

There exist several terms for these structural measures and behavioural constraints: ‘restructuring measures’, ‘compensatory measures’, ‘remedies’ or ‘commitments’. It may therefore be useful to elaborate on the terminology.

In the Commission decisions, the term ‘commitments’ is used most frequently. However, as will be explained in the following subsection, this term does not cover all structural measures and behavioural constraints, since they sometimes take the form of conditions.

To the extent that the structural measures and behavioural constraints are included in the restructuring plan, they can be described as ‘restructuring measures’. Sometimes, the term ‘compensatory measures’ is used. Although this term is sometimes used as a synonym for restructuring measures[151], it is more often used to describe a specific type of restructuring measure: i.e. the measures that are aimed at limiting competition distortions. For instance, the 2008 Banking Communication requires “compensatory measures to limit distortions of competition”.[152]

In the literature, the term ‘remedies’ is often used. By contrast, the Commission decisions rarely use this term.[153] It should be noted that the term ‘remedies’ is more common in the other fields of EU competition law: antitrust and merger control. The term ‘remedies’ can be found in the Restructuring Communication; mostly in the context of competition distortions.[154] Therefore, the terms ‘remedies’ and ‘compensatory measures’ are often used interchangeably.[155] However, remedies are sometimes considered to also include burden-sharing

151. For instance, Drijber & Burmester (2009, p. 580) argue that “compensatory measures are essentially synonymous for restructuring measures”.
152. Point 14 of the 2008 Banking Communication.
153. The term ‘remedies’ can only be found in: Fortis, 3 December 2008, para. 96;
154. See points 19, 36, 38 of the Restructuring Communication.
155. See for instance: Lo Schiavo 2013, p. 154.

measures.[156] Whether remedies also include viability-measures is less clear. For that reason, the term ‘remedies’ might not be completely suitable to describe all the three types of measures in the restructuring plan.

Therefore, in this PhD-study, the term ‘restructuring measures’ is used as a catchall term for the structural and behavioural measures that are included in the restructuring plan. When referring to one of the three types of restructuring measure, the term ‘viability measure’, ‘burden-sharing measure’ respectively ‘compensatory measure’ is used.

It should, however, be noted that not all behavioural constraints originate from the restructuring plan. Indeed, some behavioural constraints originate from a bank support scheme. As will be explained in section 8.8, all bank support schemes provide for some behavioural constraints. Are the behavioural constraints that originate from the scheme ‘restructuring measures’? To the extent that the restructuring plan includes information about the behavioural constraints originating from the scheme, these behavioural constraints can still be considered as ‘restructuring measures’. However, there are a few instances in which a restructuring plan is not required. For instance, banks that only participate in a guarantee scheme do not have to draw up a restructuring plan. In such a cases, the behavioural constraints cannot be considered as ‘restructuring measures’. Thus, the term ‘restructuring measures’ is not a perfect catchall term for all structural measures and behavioural constraints. Nevertheless, as will be explained in section 6.9, this PhD-study focusses on the assessment of whether the aid is compatible *in light of the restructuring plan*. Because of this special focus, this PhD-study will mainly speak of ‘restructuring measures’.

3.7.3 Imposed by the Commission or proposed by the Member State?

Restructuring measures can take the form of either *commitments* or *conditions*. Substantively, there is no difference between commitments and conditions; but there is an important procedural difference between them. In section 2.5, it was explained that a State aid procedure has two phases: a preliminary investigation procedure and a formal investigation procedure. At the end of the preliminary investigation procedure, the Commission can accept *commitments* by the Member State and adopt a decision not to raise objections.[157] If, however, there are serious doubts as to the compatibility of the notified aid measure with the

156. For instance, Laprévote (2012, p. 99) distinguishes three categories of remedies: own contribution measures, structural measures and behavioural measures.
157. On the basis of Article 4(3) of the 2015 Procedural Regulation/Art. 4(3) of the 1999 Procedural Regulation.

common market, then the Commission can initiate the formal investigation procedure. At the end of the formal investigation procedure, the Commission can adopt a conditional decision, thereby imposing *conditions* on the bank concerned.[158]

Most decisions concerning State aid to banks are 'commitment decisions'.[159] The advantages of commitment decisions over conditional decisions are obvious: the formal investigation procedure is avoided, which saves time. Furthermore, the avoidance of the formal investigation procedure means that extra administrative efforts are avoided. In addition, the opening of the formal investigation procedure is seen as a 'clash' between the Commission and the Member State concerned – which they might wish to avoid.[160]

The key difference between a conditional decision and a commitment decision is that in a conditional decision, the Commission *imposes* restructuring measures, while a commitment decision is based on the restructuring measures *proposed* by the Member State concerned.

Formally speaking, the Member State proposes commitments. However, in reality, the commitments result from negotiations between the Commission and the Member State (and the beneficiary bank). When proposing restructuring measures, the Member State anticipates the commitments that the Commission would require.[161] If the commitments are deemed insufficient by the Commission, the Commission would not adopt a decision not to raise objections. In the end, all State aid measures have to be authorised by the Commission before they can be implemented. The Commission thus has the decisive say in the negotiations about the restructuring measures. Therefore, the Commission is in a position to require certain commitments from the Member State. It has been remarked that commitment decisions can sometimes be better characterised as a Commission's unilateral decision rather than a truly 'negotiated' solution.[162] In some cases, the Commission even explicitly indicated that it expected certain commitments. This can be illustrated by the following recital from the Opening Decision on HSH Nordbank:

> "Moreover, the Commission appreciates the commitment not to advertise with the fact that the bank received State aid. However, this is insufficient to mitigate the distortion of competition and *the Commission would expect* further measures of a behavioural or structural nature, especially in Northern

158. On the basis of Article 9(4) of the 2015 Procedural Regulation/Art. 7(4) of the 1999 Procedural Regulation.
159. Lo Schiavo 2013, p. 165.
160. Botta 2016, p. 274.
161. Lyons & Zhu 2012, p. 64; Rivas 2014, p. 723.
162. Lo Schiavo 2013, p. 166.

> Germany, such as a commitment that the capital effects of relief will be used for providing credit to real economy and not for financing of a growth strategy (in particular for acquisitions), a commitment for no price leadership in the market or a commitment for restrictions on dividend policy or caps on executive remuneration".[163]

If the commitments proposed by the Member State are not accepted by the Commission, the Member State is effectively forced to propose more far-reaching restructuring measures. Otherwise, the Commission will not adopt a commitment decision. In such a case, the Commission will impose restructuring measures by adopting a conditional decision. This is also illustrated by the case of HSH Nordbank:

> "As Germany refuses to propose additional own contribution measures, the aid measure cannot be approved as compatible under Article 7(3) of Regulation (EC) No 659/1999. Such measures can, however, be imposed by attaching conditions to the Decision".[164]

What is the position of the beneficiary bank vis-à-vis the Member State? The beneficiary bank has some say in the negotiations about the restructuring plan. In that regard, the Court has held that "in principle, there is nothing to prevent the content of all the measures provided for by the restructuring plan from being the subject-matter of negotiations between the Commission and the Member State concerned, *in which the beneficiary of the aid may, where appropriate, participate*".[165] Laprévote argues that it is likely that most cost reduction measures result from the banks' own decisions.[166] Nicolaides & Rusu argue that compensatory measures included in restructuring plans are defined first by the beneficiary banks themselves and then proposed by the corresponding Member States.[167] However, while the beneficiary bank might have some say on the restructuring measures, the Commission has the decisive say. In the end, the beneficiary bank is subject to the restructuring plan and the restructuring measures that are included in it.

163. HSH Nordbank, 22 October 2009, para. 80. A similar consideration can be found in BayernLB, 12 May 2009, para. 96.
164. HSH Nordbank, 20 September 2011, para. 242.
165. Case T-457/09, para. 284.
166. Laprévote 2012, p. 99.
167. Nicolaides & Rusu 2010, p. 781.

3.8 Conclusion

While the previous chapter focussed on State aid in general, this chapter specifically focussed on State aid *to banks*. The reason for this special focus on banks was explained in section 3.2. This section explored the two specific features of the banking sector: banks are *essential to the economy* and banks are *special*. These two specific features of the banking sector explain why State aid to banks might be justified. This was recognised by the Commission. As set out in section 3.4, the Commission adopted the so-called Crisis Framework, in which the Commission deviated from the strict and rigid approach of the R&R-guidelines. Notwithstanding this flexible approach towards banks, the restructuring measures that the Commission required from beneficiary banks attracted a lot of criticism, as explained in section 3.7.

State aid is one way of dealing with ailing banks. When the financial crisis broke out in 2008, Member States had no alternative for granting State aid (other than allowing banks to fail). However, in 2014, a bank recovery and resolution framework was adopted. This framework provides for an alternative way of dealing with ailing banks (i.e. by putting them into resolution). How this framework affects State aid (and State aid control) will be discussed in the next chapter.

Chapter 4. Bank State aid under the BRRD and the SRM

4.1 Introduction

Since the financial crisis, the supervisory and regulatory landscape has changed dramatically. In particular, a bank recovery and resolution framework has been created, consisting of the Bank Recovery and Resolution Directive (BRRD)[1] and the Single Resolution Mechanism (SRM)-Regulation.[2]

Before the adoption of the bank recovery and resolution framework, Member States were forced to choose between "two evils", when dealing with an ailing bank: either allowing the bank to fail (under normal insolvency procedures) or bailing out the bank (i.e. rescuing the bank by granting State aid).[3] The latter option was the "lesser evil": although State aid leads to competition distortions and moral hazard, it preserves financial stability. Allowing banks to fail and to go into insolvency would be much more damaging. In that regard, the Commission remarked:

> "Put bluntly, there was no simple way for a bank to continue to provide essential banking functions whilst in insolvency, and in the case of a failure of a large bank, those functions could not be shut down without significant systemic damage".[4]

1. Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.
2. Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.
3. Kastelein 2014, p. 42.
4. Commission Communication of 20 October 2010, 'An EU Framework for Crisis Management in the Financial Sector', p. 2.

The inadequacy of normal insolvency procedures underlined the need for a special insolvency regime for banks. The recovery and resolution framework constitutes an alternative to normal insolvency procedures.[5] At the same time, it also provides an alternative to the bail-out of a bank. It effectively adds another option to the "two evils": instead of allowing the bank to fail (and go into insolvency) or bailing out the bank, the bank can be put into resolution.

The introduction of the recovery and resolution framework raises the following question: (how) does the recovery and resolution framework affect the way in which State aid is granted? Does State aid to banks still have a future now that the BRRD and SRM entered into force?

A similar question arises in the context of the European Stability Mechanism (ESM). As will be explained in section 4.5, it is now possible for the ESM to directly recapitalise banks: the ESM direct recapitalisation instrument (DRI). The question could arise whether State aid rules also apply to the ESM direct recapitalisation instrument. After all, if the ESM recapitalises banks *directly*, is the recapitalisation imputable to the Member State?

These questions will be answered in the present chapter. In the context of this PhD-study, these questions are of the utmost importance. If banks can be allowed to fail by putting them into resolution, then this reduces the need for State aid measures. Accordingly, a study of the Commission's assessment of State aid measures to banks would lose some of its relevance. However, as will be explained in this chapter, State aid to banks remains relevant.

This chapter is structured as follows. First, the background and context of the BRRD/SRM will be provided (in section 4.2). Section 4.3 sets out the main elements of the BRRD/SRM. Section 4.4 delves into the fundamental question regarding the impact of the BRRD/SRM on the State aid control framework. The impact of the ESM will be discussed in section 4.5. The conclusion of this chapter – that State aid (control) remains relevant – can be found in section 4.6.

5. One of the main differences between resolution and normal insolvency concerns the objectives: the main aim of normal insolvency procedures is the maximisation of assets available to satisfy creditors' claims, while resolution is primarily aimed at public policy objectives such as financial stability and the continuity of critical functions. See: Commission Communication of 20 October 2009, 'An EU Framework for Cross-Border Crisis Management in the Banking Sector', p. 9.

4.2 The background and context of the BRRD and the SRM

The recovery and resolution framework consists of the BRRD and the SRM-Regulation. These two legal instruments have a different background. The BRRD is part of the Single Rule Book and applies to all banks in the EU, whereas the SRM is part of the Banking Union and only applies to banks in the euro area.[6]

4.2.1 The background of the BRRD

One of the first steps towards a recovery and resolution framework was the adoption of the Commission Communication of 20 October 2010 "An EU Framework for Crisis Management in the Financial Sector".[7] In this Communication, the Commission set out plans for an EU framework for crisis management in the financial sector. On 6 June 2012, the Commission adopted a legislative proposal for bank recovery and resolution. This eventually led to the BRRD, which was adopted on 15 May 2014.

The adoption of the BRRD should be seen in the context of steps taken at the international level: at the G20 Toronto Summit of June 2010, the FSB was called to develop "concrete policy recommendations to effectively address problems associated with, and resolve, systemically important financial institutions".[8] Accordingly, in October 2011, the FSB issued Key Attributes of Effective Resolution Regimes for Financial Institutions.[9] The BRRD is in line with these Key Attributes.[10]

The BRRD is part of the Single Rule Book, which is a single set of harmonized prudential rules which all banks in the EU should respect.[11] Another main element of the Single Rule Book is the CRD IV-package.[12] While the

6. Another difference between the BRRD and the SRM is the subject matter and scope: the BRRD applies to banks ('credit institutions') and investment firms, whereas the SRM only concerns banks and banking groups.
7. On 20 October 2009 and on 26 May 2010, the Commission had already adopted a Communication "An EU Framework for Cross-Border Crisis Management in the Banking Sector" respectively a Communication "Bank Resolution Funds".
8. Point 21 of the G20 Toronto Summit Declaration of June 2010.
9. NB: in October 2014, the Key Attributes were updated.
10. This has been observed by many authors. See for instance: Huertas et al. 2016, p. 1-2. It is also noteworthy that in the Proposal for a BRRD, the Commission already referred to the FSB Key Attributes.
11. The Single Rule Book is sometimes considered to be the foundation of the Banking Union. However, it should be kept in mind that the Banking Union only concerns banks in the Eurozone, while the Single Rule Book applies to all banks in the EU.
12. The CRD IV-package consists of a Regulation and a Directive. The CRD IV-package is an implementation of Basel III. In addition, it includes some new elements. Basel III/CRD IV is intended to make banks stronger and more resilient. Basel III/CRD IV changes the capital requirements: it requires *higher* capital buffers, and capital buffers *of better quality.*

BRRD is part of the Single Rule Book, the SRM is part of the Banking Union – which will be discussed in the following subsection.

4.2.2 The background of the SRM

The SRM is one of the pillars of the Banking Union – the other pillar being the Single Supervisory Mechanism (SSM). The Banking Union was created in response to the Eurozone crisis.[13] The Eurozone crisis demonstrated that there was a "vicious circle"[14] between the finances of banks and the finances of Member States: an ailing bank was usually rescued by the Member State in which the bank in question was established. As a result of these aid measures, the financial position of that Member State deteriorated. This, in turn, affected the banks in that Member State, since banks often hold government bonds of 'their' government. Providing support to these banks imposes a further burden on the finances of the State. Hence: there is a vicious circle between banks and governments.[15] The Commission noted that this situation "poses specific risks within the euro area, where the single currency increases the likelihood that developments in one Member State can create risks for economic development and the stability of the Euro area as a whole".[16]

The Banking Union is aimed at breaking the vicious circle between banks and governments. The Banking Union allows for a rescue of banks at EU-level: the Euro Area Summit Statement of 29 June 2012 held that the ESM should get the possibility to recapitalise banks directly. As a corollary, if banks are rescued/supported at EU-level, then banking supervision should also be transferred to EU-level.[17] In order words: the SSM was a precondition for the direct recapitalisation by the ESM.

Another rationale of the Banking Union is that nowadays, banks often operate across national borders. Cross-border banks can operate through branches or through subsidiaries. Before the entry into force of the SSM, the supervision of cross-border banks was divided by home- and host-supervisors.[18] Home and host supervisors worked together in colleges of supervisors. National financial supervisors are inclined to take only national interests into account.

13. Véron (2013, p. 4) aptly called the Eurozone crisis a "trigger" for the banking union.
14. Sometimes referred to as "negative feedback loop", "doom loop" or "deadly embrace".
15. As Franchoo, Baeten & Salem (2014, p. 568) rightly point out, the fact that almost the entire banking sector in the programme countries (i.e. Ireland, Portugal, Greece, Spain, and Cyprus) had to be restructured provides a clearly demonstration of the link between the financial crisis and the sovereign debt crisis.
16. SSM Proposal, p. 2.
17. Bovenschen et al. 2013, p. 364; Hadjiemmanuil 2015a, p. 20; Kastelein 2014, p. 35; Ter Kuile 2015, p. 10 (and in particular footnote 139).
18. For more information, see: Joosen 2010b.

The Turner Review (2009) summarised the essence of the problem by quoting Mervyn King (former governor of the Bank of England) who said that "banks are global in life, but national in death".[19] The introduction of the Banking Union was meant to remedy this situation.

The first pillar of the Banking Union is the SSM.[20] The SSM is composed of the European Central Bank (ECB) and the national competent authorities (NCA's) of the participating Member States. Within the SSM, the ECB is responsible for direct supervision of significant[21] banks, while the NCA's are responsible for direct supervision of less significant institutions (though this supervision is subject to the oversight of the ECB).[22] On 4 November 2014, the ECB formally assumed its responsibility as supervisor of the banks in the euro area.

While the importance of the SSM cannot be overstated, its relevance to this PhD-study is limited, since it does not have any impact on State aid control. By contrast, the SRM (the other pillar of the Banking Union) is much more relevant to this PhD-study: the SRM concerns the resolution of failing banks and therefore touches upon the issue of State aid to failing banks.

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19. Turner Review, p. 36.
20. *Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions* ("SSM-Regulation"). Further rules are laid down in the SSM Framework Regulation, which the ECB adopted pursuant to Art. 6(7) SSM-Regulation: *Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities*.
21. Art. 6(4) SSM-Regulation clarifies when a bank is 'significant'. A bank is significant in the following situations:
    - The total value of its assets exceeds EUR 30 billion.
    - The ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20%, unless the total value of its assets is below EUR 5 billion.
    - The ECB may consider a bank to be of significant relevance. The ECB can make this assessment on its own initiative or following a notification from a national competent authority.
    - The bank has received public financial assistance from the EFSF or the ESM.
    - The bank is one of the three most significant credit institutions in the participating Member State.
22. Art. 4(1) SSM-Regulation confers prudential tasks on the ECB. As set out in Art. 3-6 of the SSM Framework Regulation, the day-to-day supervision of significant banks is carried out by Joint Supervisory Teams (JST), which are composed of staff members from the ECB and from the NCA's.

4.2.3 The added value of the SRM

To a large extent, the SRM-Regulation is based on the BRRD. In that regard, recital 18 of the SRM-Regulation even provides that in order to ensure a level playing field within the internal market as a whole, the SRM-Regulation is consistent with the BRRD.[23] But where the BRRD introduces *national* resolution authorities and *national* resolution financing arrangements, the SRM-Regulation introduces a Single Resolution Board (SRB) and a Single Resolution Fund (SRF). The creation of the SRB and the establishment of the SRF constitute the added value of the SRM.

Firstly, because of the creation of the SRB, the SRM provides for a *centralisation of decision-making*. In its Proposal for a SRM-Regulation, the Commission already explained the need for the SRM in addition to the BRRD by pointing out that in the Banking Union, bank supervision and resolution need to be exercised by the same level of authority.[24]

Within the SRM, the SRB and the national resolution authorities cooperate. The division of tasks within the SRM is set out in Art. 7 SRM-Regulation. Pursuant to Art. 7(2), the SRB is responsible for significant banks and for other cross-border banks. Other banks fall under the responsibility of the national resolution authorities.[25]

Secondly, because of the establishment of the SRF, the SRM *breaks the negative feedback loop* between bank and governments. In recital 10 of the SRM-Regulation, it is indicated that since the BRRD provides for *national* financing arrangements, it does not sufficiently reduce the dependence of banks on the support from national budgets.[26] By contrast, the SRF breaks the link between sovereigns and the banking sector.

23. See also Art. 5 SRM-Regulation which provides that where, pursuant to the SRM-Regulation, the SRB performs tasks and exercises powers, which, pursuant to the BRRD are to be performed or exercised by the national resolution authority, the SRB shall, for the application of the SRM-Regulation and of the BRRD, be considered to be the relevant national resolution authority.
24. This viewpoint was expressed by the European Council and reiterated by the Commission in recital 12 of the SSM-Regulation.
25. However, also with regard to these bank, the SRB may, pursuant to Art. 7(4)(b) SRM-Regulation, exercise directly all of the relevant powers under the SRM-Regulation. Pursuant to Art. 7(5) SRM-Regulation, participating Member States may decide that the SRB exercise all of the relevant powers and responsibilities conferred on it by the SRM-Regulation in relation to the 'non-significant banks'.
26. Recital 10 SRM-Regulation.

4.3 The main elements of the BRRD and SRM

The BRRD distinguishes between three main stages: *preparation* (see subsection 4.3.1), *early intervention* (see subsection 4.3.2) and *resolution* (see subsection 4.3.3). The most prominent feature of the bank recovery and resolution framework is the bail-in (see subsection 4.3.4). Other important elements are the resolution strategies for cross-border banking groups (see subsection 4.3.5) and the resolution fund (see subsection 4.3.6).

4.3.1 Preparation

In the preparation-stage, the bank makes a *recovery plan*, while the resolution authority makes a *resolution plan* and assesses the *resolvability* of the bank.

Recovery plans

Pursuant to Art. 5(1) BRRD, banks[27] have to draw up a recovery plan.[28] A recovery plan has to include measures to be taken by the bank to restore its financial position following a significant deterioration of its financial situation.[29] Recovery plans have to be updated regularly.[30] Pursuant to Art. 6 BRRD, recovery plans have to be submitted to the competent authority[31] for review. The competent authorities thus assess the appropriateness of the recovery plans.[32]

Resolution plans

Where the recovery plan is drawn up by the bank, the resolution plan is drawn up by the resolution authority. This follows from Art. 10 BRRD. Pursuant to Art. 8 SRM-Regulation, the SRB shall draw up and adopt resolution plans for the significant banks. The national resolution authorities shall draw up resolution plans for the other banks.[33]

27. Although I speak of "banks", it should not be forgotten that the BRRD applies to credit institutions (i.e. banks) and investment firms (together referred to as "institutions").
28. Art. 74(4) CRD IV already provided for the obligation to prepare recovery plans and resolution plans. On this aspect, CRD IV anticipated the BRRD. With the entry into force of the BRRD, art. 74(4) CRD IV was deleted (pursuant to Art. 124 BRRD).
    In the Netherlands, DNB required systemically important banks already in 2011/2012 to draw up recovery plans (Kamerstukken 31980, nr. 59, p. 6).
29. Pursuant to Art. 5(5) BRRD, recovery plans should include the information listed in Section A of the Annex of the BRRD.
30. At least annually, pursuant to Art. 5(2) BRRD.
31. The competent authority is the relevant supervisor. See point 21 of Article 2(1) BRRD which refers to the definition given in point 40 of Article 4(1) CRR.
32. Art. 6(4) BRRD provides for a role for the resolution authority as regards the assessment of the recovery plan.
33. Art. 9 SRM-Regulation.

What is a resolution plan? The resolution plan shall provide for the resolution actions which the resolution authority may take where the institution meets the conditions for resolution. When drawing up the resolution plan, the resolution authority shall identify any material impediments to resolvability and, where necessary and proportionate, outline relevant actions for how those impediments could be addressed.[34]

The resolution plan shall provide for the resolution actions which the SRB may take where a bank meets the conditions for resolution.[35] In that regard, Art. 23 SRM-Regulation provides that when adopting a resolution scheme, the SRB, the Council and the Commission shall take into account and follow the resolution plan as referred to in Article 8 unless the SRB assesses, taking into account the circumstances of the case, that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plan.

Resolvability

Pursuant to Art. 15 BRRD and Art. 10 SRM-Regulation, the resolution authority will assess the resolvability of the bank.[36] Section C of the Annex to the BRRD gives a list of matters that the resolution authority is to consider when assessing the resolvability of the bank. When there are impediments to the resolvability of a bank, the resolution authority can require the bank to take measures that reduce or remove the impediments in question.[37] For instance, it can require the bank to divest specific assets or require changes to legal or operational structures of the bank.[38] Thus, resolution authorities have far-reaching powers, not only in the resolution-stage, but also in the preparation-stage.

As has been remarked in the literature, the drawing up of "living wills" – a term sometimes used to refer to recovery and resolution plans – could act as a catalyst for thinking and taking action.[39] The structure of a bank or banking group can be very complex. The different legal entities within a banking group are often

34. Art. 10(2) BRRD.
35. Art. 8(6) SRM-Regulation.
36. Art. 15(1) BRRD provides that an institution shall be deemed to be resolvable if it is feasible and credible for the resolution authority to either liquidate it under normal insolvency proceedings or to resolve it by applying the different resolution tools and powers to the institution while avoiding to the maximum extent possible any significant adverse effect on the financial system, including in circumstances of broader financial instability or system-wide events, of the Member State in which the institution is established, or other Member States or the Union and with a view to ensuring the continuity of critical functions carried out by the institution. See also Art. 10(3) SRM-Regulation.
37. Art. 17 BRRD.
38. Art. 17(5)(d) and (g) BRRD.
39. Avgouleas, Goodhart & Schoenmaker 2013, p. 211.

interrelated, because key functions (such as risk management, IT, treasury and cash management) are often centralised; resulting in a "mismatch between the legal and operational structure".[40] This might constitute an impediment to the resolvability of the bank.[41] Since the measures enshrined in the resolution plan can only be implemented if the bank is organised and structured in line with the resolution plan, the resolution plan dictates the current structure of the bank. Thus, recovery and resolution planning can contribute to reducing the complexity of the bank's legal and operational structure.[42]

4.3.2 Early intervention

The second stage that the BRRD provides for is the stage of early intervention. In this stage, the financial and economic situation of the bank is deteriorating, but an economic recovery is still possible. When – because of a deteriorating situation – a bank infringes or is likely to infringe requirements from CRD IV/CRR, the competent authority can take the early intervention measures that are listed in Art. 27 BRRD. For instance, the competent authority can require the management body of the bank to implement one or more of the arrangements or measures set out in the recovery plan.[43] The competent authority can also require one or more members of the management body or senior management of the bank to be removed or replaced if those persons are found unfit to perform their duties.[44]

It is worth stressing that these measures can be taken by the *competent* authority rather than by the resolution authority. In the early intervention-stage, the competent authority plays a central role; in the resolution-stage, the central role is played by the resolution authority – as will be discussed in the following subsection.

4.3.3 Resolution

The third stage provided for by the BRRD is the stage of resolution. The formal definition of 'resolution' can be found in Article 2(1) BRRD; but simply said, resolution is the restructuring of an ailing bank by a resolution authority through

40. Van der Zwet 2011, p. 21. See also: Gleeson 2012, p. 25-26. In that regard, Hüpkes (2009, p. 380-381) speaks of 'aligning the legal form and economic function'.
41. Schillig 2014, p. 80.
42. Bierens (2017) argues that the drawing up of resolution plans will also influence the *governance* of the bank.
43. Art. 27(1)(a) BRRD. In that regard, Art. 5(5) BRRD stipulates that recovery plans shall include possible measures which could be taken by the bank where the conditions for early intervention under Article 27 are met.
44. Art. 27(1)(d) BRRD.

the use of resolution tools. In essence, when the *resolution conditions* (see subsection 4.3.3.2) are met, the resolution authority applies the *resolution tools* (see subsection 4.3.3.3) in order to achieve the *resolution objectives* (see subsection 4.3.3.1).

4.3.3.1 Resolution objectives

Resolution constitutes an alternative to normal insolvency procedures. The objectives of resolution[45] are to ensure the continuity of critical functions and to avoid a significant adverse effect on the financial system (in particular by preventing contagion). Another objective is to protect public funds by minimising reliance on extraordinary public financial support. In other words: the costs for the taxpayer should be minimised.

4.3.3.2 Resolution conditions

What triggers resolution? For a resolution action to take place, three resolution conditions have to be met: (i) the bank is failing or likely to fail[46]; (ii) there is no reasonable prospect that any alternative private sector measures would prevent the failure of the bank within a reasonable timeframe; and (iii) a resolution action is necessary in the public interest. These resolution conditions are listed in Art. 32(1) BRRD and elaborated in Art. 32(4) and (5) BRRD.[47]

With respect to the first resolution condition, the following aspect is worth noting: one of the instances in which a bank is considered to be ‘failing or likely to fail’ is when it needs “extraordinary public financial support” [48] – in other words: when it needs State aid. Thus, the granting of State aid to a bank triggers resolution (provided that the other resolution conditions are also met). There are, however, three exceptions. These will be discussed in more detail in section 4.4.1.

Since putting a bank under resolution has far-reaching implications, the assessment whether the resolution conditions are met, is very important. Equally important is the question *by whom* the resolution conditions are assessed.

45. The resolution objectives are listed in Art. 31 BRRD and Art. 14(2) SRM-Regulation.
46. When a bank is insolvent, the criterion ‘failing or likely to fail’ is met. But this criterion can also be met in some other instances, also in instances in which the bank is still solvent. For this reason, Hadjiemmanuil (2015b, p. 243) is quite critical.
47. The corresponding provisions from the SRM-Regulation are Art. 18(1) and Art. 18(4) and (5).
48. Art. 32(4)(d) BRRD.

In that regard, a distinction should be made between banks outside the Eurozone (to which the SRM-Regulation does not apply) and banks inside the Eurozone (to which the SRM-Regulation applies). As regards the latter, a further distinction can be made between banks that fall under the responsibility of the SRB and banks that fall under the responsibility of the national resolution authorities. Roughly speaking, significant banks and cross-border banks fall under the responsibility of the SRB, whilst the 'small banks' fall under the responsibility of the national resolution authorities.[49]

The following table provides an overview of the authorities that decide whether the resolution conditions are met. This can be the NCA (national competent authority), NRA (national resolution authority), SRB (Single Resolution Board) or ECB (European Central Bank).

<table>
<tr><th colspan="4"><u>Who decides whether the resolution conditions are met?</u></th></tr>
<tr><td rowspan="2"></td><td rowspan="2">With regard to banks outside the Eurozone (and thus outside the scope of the SRM)</td><td colspan="2">With regard to banks inside the Eurozone</td></tr>
<tr><td>Banks falling under the responsibility of the SRB</td><td>Banks falling under the responsibility of the NRA</td></tr>
<tr><td>First resolution condition:
'Failing or likely to fail'</td><td>NCA, after consulting the NRA
or:
NRA, after consulting the NCA (pursuant to Art. 32(2) BRRD)</td><td>ECB, after consulting the SRB
or:
SRB, but only when the ECB is informed and does not make an assessment</td><td>NCA, after consulting the NRA
or:
NRA, after consulting the NCA
NRA informs and coordinates with the SRB</td></tr>
<tr><td>Second resolution condition:
'No alternatives'</td><td>NRA</td><td>SRB
ECB may inform the SRB that it considers this condition to be met.</td><td>NRA
NRA informs and coordinates with the SRB</td></tr>
<tr><td>Third resolution condition:
'In the public interest'</td><td>NRA</td><td>SRB</td><td>NRA
NRA informs and coordinates with the SRB</td></tr>
</table>

49. As explained in section 4.2.3.

Situation before 1 January 2016

The SRM became fully operational on 1 January 2016, whereas the BRRD (with the exception of the provisions on the bail-in) already had to be implemented in national legislation by 31 December 2014.[50] So there was a 'transition period' from 1 January 2015 until 31 December 2015. The situation for banks inside the Eurozone in this transition period reflects the situation for banks outside the Eurozone nowadays: only the BRRD applies. In such a situation, the resolution authority determines whether the conditions of 'no alternatives' and 'in the public interest' are met, while the competent authority determines whether the condition of 'failing or likely to fail' is met.

The allocation of tasks can be illustrated by the case of the Cooperative Bank of Peloponnese. The Commission decision on the Cooperative Bank of Peloponnese indicates that the Bank of Greece determined that the bank was 'failing or likely to fail'.[51] The Bank of Greece is the competent authority as well as the resolution authority. In that regard, the Credit and Insurance Committee (CIC) of the Bank of Greece has been entrusted with prudential supervision, whilst the Resolution Measures Committee (RMC) has been entrusted with issuing all the decisions and recommendations of the Bank of Greece as resolution authority. With respect to the resolution of the Cooperative Bank of Peloponnese, it was the Credit and Insurance Committee (CIC), in consultation with the Resolution Measures Committee (RMC), that determined (by decision no. 170/4 of 13 December 2015) that the condition of 'failing or likely to fail' was met.

4.3.3.3 Resolution tools

The resolution tools enable resolution authorities to assume control of the failing bank.[52] There are four resolution tools: i) sale of business, ii) bridge institution, iii) asset separation, and iv) bail-in.[53]

50. Art. 130 BRRD and Art. 99 SRM-Regulation.
51. Cooperative Bank of Peloponnese, 17 December 2015, para. 17.
52. The situation under the SRM is as follows. The resolution procedure is laid down in Art. 18 SRM-Regulation. Pursuant to Art. 18(6) SRM-Regulation, the SRB shall, when the three resolution criteria have been met, adopt a resolution scheme. The resolution scheme shall: (i) place the bank under resolution; (ii) determine the application of the resolution tools to the bank under resolution; (iii) determine the use of the Single Resolution Fund to support the resolution action. This resolution scheme is addressed to the national resolution authorities. The SRB shall – pursuant to Art. 28 SRM-Regulation – closely monitor the execution of the resolution scheme by the national resolution authorities.
53. Art. 37(3) BRRD.

Sale of business tool

The sale of business tool[54] makes it possible to rescue the sound parts of the bank and to maintain the critical functions by selling (parts of) the bank to a private sector purchaser. If only part of the bank is transferred, the residual entity shall be wound up under normal insolvency proceedings.[55] A key feature of the sale of business tool is that the resolution authority can sell (part of) the bank *without the consent of shareholders*. To that end, Art. 63 BRRD provides that resolution authorities should have the power to take control of a bank under resolution and exercise all the rights and powers conferred upon the shareholders, other owners and the management body of the bank.

Bridge institution tool

The bridge institution tool[56] is similar to the sale of business tool. The difference between these two tools concerns the purchaser of the bank: in case of the sale of business tool, the purchaser is a private party, while in case of the bridge institution tool, the purchaser (i.e. the bridge bank) is wholly or partially owned by one or more public authorities (which may include the resolution authority) and is controlled by the resolution authority. The bridge institution tool can be used when there is no private sector purchaser willing to take over the bank under resolution.

Asset separation tool

The asset separation tool[57] can be used to transfer assets, rights or liabilities of a bank under resolution to a separate vehicle.[58] This tool can be used to create a 'bad bank'. Since the asset separation tool effectively amounts to an asset relief measure, the BRRD provides that this tool should be used only in conjunction with other tools in order to prevent an undue competitive advantage for the failing bank.[59]

54. Defined in point 58 of Art. 2(1) BRRD as "the mechanism for effecting a transfer by a resolution authority of shares or other instruments of ownership issued by an institution under resolution, or assets, rights or liabilities, of an institution under resolution to a purchaser that is not a bridge institution, in accordance with Article 38".
55. Art. 37(6) BRRD.
56. Defined in point 60 of Art. 2(1) BRRD as "the mechanism for transferring shares or other instruments of ownership issued by an institution under resolution or assets, rights or liabilities of an institution under resolution to a bridge institution, in accordance with Article 40".
57. Defined in point 55 of Art. 2(1) BRRD as "the mechanism for effecting a transfer by a resolution authority of assets, rights or liabilities of an institution under resolution to an asset management vehicle in accordance with Article 42".
58. For an illustration of the asset separation tool, see the case of Magyar Kereskedelmi Bank (MKB), SA.40441, 16 December 2015.
59. With the exception of the asset separation tool (which must always be applied in combination with another resolution tool), the resolution tools may be applied individually or in any combination; this follows from Art. 37(4) BRRD.

Bail-in tool
The bail-in tool[60] is undoubtedly one of the most prominent features of the BRRD.[61] The bail-in tool is the power of a resolution authority to cancel the bank's shares and to write down the bank's liabilities or to convert them into equity.[62] The bail-in tool will be discussed in more detail in the following subsection.

4.3.4 Bail-in

4.3.4.1 Reasons for introducing the bail-in tool

The bail-in can best be explained by contrasting it with the bailout. With a bank bailout, the State – and thus the taxpayer – bears most of the burden of rescuing and restructuring the bank, while with a bail-in, the costs of the rescue and restructuring of the bank are primarily born by the shareholders and creditors of the bank (through a write down or conversion of their capital instruments). The bail-in tool thus minimises the costs of the resolution of a failing bank borne by the taxpayers.[63]

In addition to minimising the costs borne by the taxpayers, the bail-in removes the implicit guarantee. The implicit guarantee followed from the expectation that a Member State would bail out a failing bank.[64] Usually banks that were considered to be "too big to fail" enjoyed such an implicit guarantee. The guarantee was implicit, because there was no explicit ex ante commitment by the State to bail out the bank in case of financial difficulties. Rather, it was the expectation that the bank would be bailed out. This expectation could create moral hazard. By removing the implicit guarantee, the bail-in reduces moral hazard and strengthens market discipline.

Bank bailout led to creditor inertia.[65] Because of the implicit guarantee, investors in banks knew that their investments were relatively safe. As a consequence, they had little incentive to monitor the bank. The bail-in tool will

60. Defined in point 57 of Art. 2(1) BRRD as "the mechanism for effecting the exercise by a resolution authority of the write-down and conversion powers in relation to liabilities of an institution under resolution in accordance with Article 43".
61. The bail-in was also one of the FSB Key Attributes (Key Attribute 3.5).
62. Bail-in should not be confused with contingent convertible debt (CoCo's). See: Gleeson 2012, p. 14-15.
63. A complicating factor is that bank debt instruments are sometimes issued under foreign law. When debt instruments are not governed by EU law, there is a risk that the bail-in of these liabilities is not recognised (by the court of the third country). This reduces the effectiveness of the bail-in tool.
64. Schich & Kim 2012, p. 2.
65. Avgouleas & Goodhart 2015, p. 4.

give these investors a stronger incentive to monitor the health of a bank during normal circumstances.[66] It has, however, been questioned whether investors really are in a position to influence the course of affairs of the bank.[67]

Another reason to introduce the bail-in tool in the BRRD is *harmonisation*. Some Member States had already introduced some form of bail-in. Diverging approaches across Member States could lead to different funding costs for banks with the same creditworthiness. This would undermine the internal market and the level playing field.

4.3.4.2 Write-down and conversion power

Noteworthy in the context of the bail-in is the write-down and conversion power. [68] This power – provided for in Art. 59 BRRD[69] – can be exercised *independently* of any resolution action; but it can also be exercised *in combination with* a resolution tool.[70] Although the write down and conversion instrument is not a resolution tool, it is part of the resolution authority's toolbox. If a bank can become viable again if the write down and conversion power is applied, then the resolution authority is required to exercise the write down and conversion power. In the resolution-stage, the resolution authority is required to exercise the write down and conversion power if the resolution action would result in losses being borne by creditors.[71]

The term 'bail-in' is sometimes used as an umbrella term for the resolution tool (Art. 43 BRRD) and the write down and conversion power (Art. 59 BRRD).[72] However, the write down and conversion instrument is more limited in scope than the bail-in tool, since it only covers AT1 and Tier 2 capital instruments.[73]

4.3.4.3 Hierarchy of claims

Art. 48 BRRD provides the sequence of write down and conversion (sometimes referred to as "waterfall" or "pecking order"). The hierarchy also follows from the general resolution principles listed in Art. 34 BRRD and Art. 15 SRM-Regulation. The shareholders will bear the first losses. After the shareholders,

66. Recital 67 BRRD and recital 73 of the SRM-Regulation.
67. See, for instance: Joosen 2015, p. 44.
68. In Dutch, this is known as "AFOMKI" (which stands for "afschrijven of omzetten van kapitaalinstrumenten").
69. Art. 21 SRM-Regulation.
70. Art. 59(1) BRRD.
71. This follows from Art. 37(2) BRRD.
72. Wojcik 2016, p. 106.
73. Wojcik 2016, p. 112.

the creditors of the bank will bear losses in accordance with the order of priority claims under normal insolvency proceedings. The treatment of shareholders and creditors under normal insolvency proceedings is thus used as a "benchmark".[74] Another resolution principle is the 'no creditor worse off-principle'. This principle means that no creditor shall incur greater losses than would have been incurred if the bank had been wound up under normal insolvency proceedings.[75] While the 'no creditor worse off-principle' may sound simple, there are two complicating factors. Firstly, this principle requires a comparison with a *hypothetical* situation: it is not completely certain what creditors would have received in insolvency.[76] Secondly, the ranking of creditors in insolvency is not harmonised at the EU level.[77]

4.3.4.4 Scope of the bail-in

The bail-in applies to all liabilities of the bank, except the liabilities that are excluded pursuant to Art. 44(2) and (3) BRRD. The liabilities mentioned in Art. 44(2) BRRD are *always excluded*, while pursuant to Art. 44(3) BRRD, the resolution authority *may exclude* certain liabilities from the application of the bail-in. Covered deposits, secured/collateralized liabilities, short-term liabilities are some of the liabilities that are always excluded from the scope of the bail-in tool.

In the literature, a distinction is made between 'capital liabilities' and 'operational liabilities'.[78] Ideally, only the capital liabilities should be bailed in. Indeed, a bail-in of the operational liabilities could endanger the continuity of the critical functions of the bank. The operational liabilities should therefore be excluded from the scope of the bail-in tool.

It has been pointed out that as a result of the discretion to exclude certain liabilities in "exceptional circumstances", the bail-in might proceed differently in each Member State, if there is no EU-definition of "exceptional circumstances".[79] This risk is, however, addressed by the Commission Delegated Regulation 2016/860.[80]

74. Wojcik 2015, p. 254.
75. This principle is enshrined in Art. 34(1)(g) BRRD and Art. 15(1)(g) SRM-Regulation.
76. Avgouleas & Goodhart 2016, p. 83; Wojcik 2015, p. 257; Wojcik 2016, p. 124.
77. Gardella 2015, p. 217; Wojcik 2015, p. 257-258; Wojcik 2016, p. 124-125.
78. See, for instance: Bierens 2017, p. 243; Tucker 2013.
79. Huertas et al. 2016, p. 16-18.
80. Commission Delegated Regulation (EU) 2016/860 of 4 February 2016 specifying further the circumstances where exclusion from the application of write-down or conversion powers is necessary under Article 44(3) of Directive 2014/59/EU of the European Parliament and of the

The bail-in tool has a wider scope than the burden-sharing required by the 2013 Banking Communication. As was explained briefly in chapter 3 and will be discussed extensively in chapter 12, the 2013 Banking Communication requires burden-sharing by shareholders and subordinated debt holders; burden-sharing by senior debt holders is not required.[81]

4.3.4.5 MREL

Banks have to meet a minimum requirement for own funds and eligible liabilities (MREL).[82] The MREL ensures that banks cannot structure their liabilities in a manner that impedes the effectiveness of the bail-in.[83] In other words: the MREL ensures that there are sufficient liabilities that can be bailed in. Another objective of the MREL is to increase the predictability of the bail-in operation for the bank's investors. MREL is thus "a necessary corollary to make bail-in work".[84]

The determination of the MREL is made in parallel with the development and maintenance of the resolution plans.[85] The SRB shall address its determination to the national resolution authorities. The national resolution authorities shall implement the instructions of the SRB in accordance with Article 29. The SRB shall require that the national resolution authorities verify and ensure that banks maintain the MREL.[86]

On 9 November 2015, the FSB introduced the Total Loss-absorbing Capacity (TLAC) Term Sheet. This TLAC standard is a standard for G-SIB's.[87] The MREL was similar, but not identical to the TLAC standard. On 23 November 2016, the Commission adopted a proposal (for a regulation) to integrate the TLAC standard in the MREL.

Council establishing a framework for the recovery and resolution of credit institutions and investment firms. Art. 44(11) BRRD empowers the Commission to adopt delegated acts in accordance with Art. 115 BRRD in order to specify further the circumstances when exclusion is necessary.

81. Point 42 of the 2013 Banking Communication.
82. Art. 45 BRRD and Art. 12 SRM.
83. Recital 79 BRRD and recital 83 SRM.
84. Wojcik 2016, p. 113.
85. Art. 12(13) SRM-Regulation.
86. Art. 12(14) SRM-Regulation.
87. In the EU legislation, G-SIB's are referred to as global systemically important institutions (G-SIIs).

4.3.4.6 Criticisms of the bail-in tool

In order to fully understand the bail-in tool and its implications, it is useful to briefly discuss the criticisms that the introduction of the bail-in tool has received. These criticisms concern the *implications on the funding costs of banks* and the *risk of contagion*.

The possibility of a bail-in might make it more difficult for banks to obtain funding. The consequence of a bail-in is that bank debt entails more risk for the debt-holders, so bank debt instruments become a less attractive investment. The implicit State guarantee was removed because of the bail-in tool.[88] As a consequence, investors are only willing to invest in bank debt instruments if the bank compensates them for the higher risk; in other words, they will demand a higher rate of return. To conclude, the bail-in could lead to higher funding costs for banks.

The bail-in tool might create contagion.[89] Banks are interrelated and interconnected. Debt instruments (that could be bailed in) are often held by other banks.[90] A bail-in could thus be harmful to other banks and could thus have negative repercussions on financial stability.

The application of the bail-in tool could create social unrest. The rationale of the bail-in tool is presented as shifting the burden from taxpayers to investors. It should, however, be pointed out that 'the taxpayer' and 'the investor' can be the same person. Some households have invested in banks. Italy is a well-known example: Italian households hold about one-third of senior bank debt and almost half of total subordinated bank debt.[91] Furthermore, households are sometimes indirect investors in banks, because pension funds and insurance companies invest in banks.[92] Since households are the ultimate beneficiaries of pensions and insurance pay-outs, a bail-in of the claims of pension funds and insurance companies might indirectly harm these households.

In my opinion, while it is certainly true that a bail-in could be painful for investors, it should not be forgotten that a bailout is not completely painless for them either. Indeed, under the State aid control framework, *burden-sharing* by shareholders and by subordinated creditors is required.

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88. Wojcik 2016, p. 127.
89. Wojcik 2016, p. 129; Avgouleas & Goodhart 2015, p. 3-29; Schillig 2014, p. 94.
90. Merler pointed out that in Italy – and to a lesser extent in Spain – banks usually hold participations in each other: they are "strongly tied together in a network of cross-holdings". See: S. Merler, 'Vicious circle(s) 2.0', Bruegel blog post, 20 November 2014.
91. IMF 2016 Article IV Report, p. 25.
92. This is also remarked by R. Theissen in his blog 'Bail-in or bail-instability'.

For some creditors, the bail-in might be more burdensome than a bailout.[93] A bailout may have been more favourable to them. However, it should be recalled that a bailout (i.e. State aid) is not a right; Member States are not obliged to grant aid.[94] The counterfactual scenario is an insolvency of the bank. And the 'no creditor worse off principle' provides that the application of the bail-in tool might not result in a worse position of creditors than in case of an insolvency.

4.3.5 Resolution of a (cross-border) banking group

Banks are often organised as a banking group rather than as a single entity. This might complicate the resolution of the bank. Especially the resolution of a cross-border banking group can be complicated.[95] There are essentially two approaches to the resolution of a (cross-border) banking group: Single Point of Entry (SPE) and Multiple Point of Entry (MPE).[96] SPE means that the resolution tools are applied at the level of the top parent or holding company, and by a single resolution authority.[97] MPE means that the resolution tools are applied to different parts of the group, and by two or more resolution authorities.[98] Whether several resolution authorities are involved thus depends on whether the resolution follows a SPE approach or MPE approach. In that regard, the SPE approach has been called a 'universal approach', and the MPE approach a 'territorial approach'.[99]

The BRRD does not prescribe a specific resolution strategy. Rather, it allows for a SPE resolution, a MPE resolution or a combination of both.[100] Which resolution strategy is most effective depends on how the banking group is structured.

93. This is especially the case for senior creditors.
94. This was also stressed by AG Wahl in his Opinion in case C-526/14, para. 79: "At this juncture, it may be useful to stress that, under EU State aid rules, no undertaking can claim a right to receive State aid; or, to put it differently, no Member State can be considered obliged, as a matter of EU law, to grant State aid to a company."
95. Cross-border bank resolution has received a lot of attention in the literature. See, inter alia: Babis 2014, Lehmann 2017; Lupo-Pasini & Buckle 2015.
96. FSB 2013, p. 12-13. See also: Gardella 2015, p. 220; Lupo-Pasini & Buckle 2015, p. 218-220; Lehmann 2017, p. 116-117; Schoenmaker 2016, p. 6.
97. A formal definition of SPE can be found in Art. 2 of the Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016.
98. A formal definition of MPE can be found in Art. 2 of the Commission Delegated Regulation (EU) 2016/1075.
99. Lupo-Pasini & Buckle 2015, p. 218. See also: Gardella 2015, p. 220.
100. This follows from recital 80 BRRD and recital 23 of Commission Delegated Regulation (EU) 2016/1075.

In a MPE resolution, the resolution tools are applied to different parts of the banking group. A MPE approach is effective when the banking group's operations are divided into several clearly identifiable subgroups.[101] By contrast, when the banking group operates in a very integrated manner, a SPE approach might be more appropriate.

In a SPE resolution, the losses in the group entities should be absorbed by the top parent: an "upstream of the losses" from the subsidiaries to the parent level.[102] The SPE approach is thus only effective when there is sufficient loss-absorbing capacity at the parent level.[103] Another element that makes the SPE approach effective is when the top parent is a non-operating holding company. In such a case, the SPE resolution entails that the 'operating liabilities' (i.e. the liabilities of the operating group entities) are protected relative to the 'capital liabilities' (i.e. the liabilities of the top company).[104]

4.3.6 Resolution fund

A key element of the BRRD is the requirement to establish national resolution funds (in the official terminology: "resolution financing arrangements").[105] The main purpose of a resolution fund is to provide liquidity to the bank or bridge institution.[106] However, the fund can also be used for recapitalisations: pursuant to Art. 44(4) BRRD the resolution financing arrangement may make a contribution to the bank under resolution. In that regard, Art. 44(5) BRRD sets out a very important restriction: the resolution fund may only make a contribution if the following two conditions are met: i) there is a bail-in of at least 8% (of total liabilities including own funds)[107], and ii) the contribution does not exceed 5% (of total liabilities including own funds).

National resolution funds are publicly managed, but they are financed through contributions paid by banks. Pursuant to Art. 103 BRRD (and Art. 70 SRM-Regulation), banks are required to make *ex ante* contributions to the resolution

101. See Art. 25(3)(d) of Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016. See FSB (2013, p. 17-20) for an overview of the preconditions for a successful implementation of a MPE strategy. See also FSB 2012, p. 16-19.
102. Gardella 2015, p. 220.
103. See Art. 25(3)(b) of Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016. See FSB (2013, p. 14-17) for an overview of the preconditions for a successful implementation of a SPE strategy. See also FSB 2012, p. 16-19.
104. Tucker 2013. See also: Bierens 2017, p. 243-244.
105. This requirement is laid down in Art. 100 BRRD. The rationale of these resolution financing arrangements is clearly explained in recital 103 of the BRRD.
106. Art. 101(1) BRRD indicates all the purposes for which resolution financing arrangements may be used. See also Art. 76(1) SRM-Regulation.
107. Art. 44(8) BRRD provides for an exception to this precondition.

fund.[108] Extraordinary *ex post* contributions are made possible by Art. 104 BRRD (and Art. 71 SRM-Regulation). The fact that banks have to contribute to the resolution fund contributes to the BRRD's objective of minimising the cost of taxpayers.

Whereas the BRRD provides for national resolution funds, the SRM provides for the creation of the Single Resolution Fund (SRF). The SRF is financed by bank contributions which are raised at national level and which are transferred to the SRF. The obligation to transfer the bank contributions to the SRF does not follow directly from the SRM-Regulation, but is established in the intergovernmental agreement (IGA[109]).[110] The SRF will be built up over a period of 8 years (starting at 1 January 2016). The SRF will initially consist of national compartments; the bank contributions are allocated to these national compartments.[111] These national compartments will gradually be merged ("mutualised") over the 8-year transition period.[112] The SRF is key to breaking the link between governments and banks. In that regard, the SRF has been called "an essential element without which the SRM could not work properly".[113]

4.4 BRRD/SRM and State aid

What is the impact of the BRRD/SRM on the State aid control framework? In this regard, there are three crucial questions. Firstly, can Member States grant State aid to banks without triggering resolution under the BRRD or the SRM? Secondly, can Member States still grant State aid to a bank under resolution? And thirdly, is the State aid control framework still relevant when a bank is restructured under the recovery and resolution framework? The following three subsections provide an answer to these three questions.

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108. Pursuant to Art. 103(2) BRRD, each bank contributes *pro rata* to the amount of its liabilities (excluding own funds) less covered deposits, with respect to the aggregate liabilities (excluding own funds) less covered deposits of all the institutions authorised in the territory of the Member State.
109. Agreement on the transfer and mutualisation of contributions to the Single Resolution fund, 21 May 2014. For the institutional aspects of the IGA, see: Drijber 2015, p. 224-225.
110. Art. 1(a) and Art. 3 of the IGA.
111. Art. 4 of the IGA.
112. The modalities of the mutualisation are laid down in Art. 5 of the IGA.
113. Recital 19 of the SRM-Regulation.

4.4.1 State aid as a trigger of resolution

Can Member States grant aid to banks without triggering resolution under BRRD or the SRM?

It should be recalled that one of the conditions for resolution is that the bank is 'failing or likely to fail'. This condition is further specified in Art. 32(4) BRRD.[114] Pursuant to Art. 32(4)(d) BRRD[115], a bank will be deemed to be 'failing or likely to fail'[116] *when extraordinary public financial support is required*. 'Extraordinary public financial support' is defined in point 28 of Article 2(1) BRRD as State aid. Thus, as general rule, the need for extraordinary public financial support to a bank triggers the resolution of the bank.

There are, however, three exceptions (listed in Art. 32(4)(d)(i)-(iii) BRRD). According to this provision, State aid does not trigger resolution when the State support takes the form of:

– (i) a State guarantee to back liquidity facilities provided by central banks according to the central banks' conditions;
– (ii) a State guarantee of newly issued liabilities; or
– (iii) an injection of own funds or purchase of capital instruments at prices and on terms that do not confer an advantage upon the institution. NB: Art. 32(4)(d) further specifies that the third exception is limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises.[117] The third exception thus refers to a so-called "precautionary recapitalisation".

The three exceptions only apply to *solvent* banks. Furthermore, the measures must be of a *precautionary and temporary nature* and must be proportionate to remedy the consequences of the serious disturbance.[118] Art. 32(4) BRRD also stresses that the measures must be conditional on final approval under the Union *State aid framework*.

Illustration of the second exception

The decision of 27 January 2015 in the case SA.40480 (eleventh prolongation of the Polish guarantee scheme) illustrates the second exception. The Commission noted that the Polish guarantee scheme was limited to solvent institutions. The guarantees granted under the scheme were of a temporary nature since

114. Art. 18(4) SRM.
115. Art. 18(4)(d) SRM.
116. 'Failing or likely to fail' is one of the conditions for resolution.
117. On 22 September 2014, EBA has published guidelines on the types of tests, reviews or exercises that may lead to support measures under Article 32(4)(d)(iii) of the Bank Recovery and Resolution Directive.
118. Art. 32(4) BRRD.

the window of their issuance was limited to six months and their maturity was limited to five years (or seven years in case of covered bonds) and were of a precautionary nature since they only covered newly issued liabilities. The guarantees granted under the scheme were also proportionate to remedy the consequences of the serious disturbance. Therefore the Commission concluded that the aid measure does not violate the intrinsically linked provisions of the BRRD.[119]

Illustration of the third exception

An illustration of the third exception can be found in the decisions that the Commission adopted in 2015 in the cases of Alpha Bank, Eurobank, NBG and Pireaus Bank.[120] Since the aid measures in these cases met the conditions of Art. 32(4)(d)(iii) BRRD, the aid measures did not trigger the 'failing or likely to fail'-criterion and could thus be implemented outside resolution. In the decisions, the Commission listed the following nine conditions that would have to be met in order for the State aid to fall under the exception of Art. 32 (4)(d)(iii) BRRD.

i. The aid is required in order to remedy a serious disturbance in the economy of a Member State and preserve financial stability.

The Commission noted that the compatibility-assessment had already shown that the measures were granted to remedy a serious disturbance in the Greek economy and to preserve financial stability in the Greek banking sector.

ii. The aid is granted at prices and on terms that do not confer an advantage upon the institution.

The Commission noted that the aid measures did not confer an undue advantage to the bank in question. An 'undue advantage' was specified as an 'advantage incompatible with the internal market under State aid rules'. This was ensured by the compliance with the compatibility conditions for restructuring aid, in particular the level of remuneration and the depth of the restructuring.

iii. The aid shall be confined to solvent institutions.

The Commission noted that the banks complied with the capital requirements when the aid measures were granted, following in particular the private capital increase and the 2015 LMEs, and as assessed by the competent supervisory authority.

119. SA.40480, 27 January 2015, para. 27-30. See also the decision on the fifth prolongation of the Cypriot guarantee scheme, SA.40027, 14 January 2015, para. 28-31.
120. Alpha Bank, 26 November 2015, para. 125-139; Piraeus Bank, para. 160-173; NBG, para. 167-182; Eurobank, para. 125-137.

iv. The aid shall be conditional on final approval under State aid framework.
The Commission noted that that the compatibility-assessment had already shown that the measures were compatible.

v. The aid shall be of a precautionary and temporary nature.
In the case of NBG, the Commission noted that this was ensured by the fact that a high proportion of the aid (75%) was granted in the form of a repayable capital instrument, i.e. CoCo's.[121] In the case of Alpha Bank, the aid measure was of a precautionary and temporary nature, because it expired automatically as Alpha Bank successfully covered the capital shortfall and did not lead to any pay-out of capital by the HFSF.[122]

vi. The aid shall be proportionate to remedy a serious disturbance in the economy of the Member State.
In each of the four decisions, the Commission noted that it had already concluded in the decision that the aid was proportionate to remedy the consequences of the serious disturbance in the Greek economy.

vii. The aid shall not be used to offset losses that the institution has incurred or is likely to incur in the near future.
The Commission noted that the aid was not used to offset losses that the bank had incurred or was likely to incur in the near future.

viii. The aid is limited to injections necessary to address capital shortfall established in the national, Union or SSM-wide stress tests, asset quality reviews or equivalent exercises conducted by the European Central Bank, EBA or national authorities.
The Commission noted that the aid measures were limited to the injections necessary to cover the capital shortfall arising under the adverse scenario of the stress test, as identified by the ECB and disclosed on 31 October 2015, after the capital shortfall arising under the AQR and the baseline scenario of the stress test had been covered by private means (i.e. capital raising from private investors, the 2015 LME and the conversion into common equity of instruments not included in the 2015 LME).

ix. The circumstances referred to in point (a), (b) or (c) of Article 32(4)(d) BRRD and the circumstances referred to in Article 59(3) BRRD are not met.
The Commission noted that the supervisory authority, the ECB, approved the capital raising of the bank and that the bank managed to raise an important part of the capital shortfall from private investors. Furthermore, the aid measures

121. NBG, para. 177.
122. Alpha Bank, para. 134.

for the bank were limited to the injections necessary to cover the capital shortfall arising under the adverse scenario of the stress test, after the capital shortfall arising under the AQR and the baseline scenario of the stress test has been covered by private means. The ECB noted in the report of the 2015 CA that covering the shortfalls by raising capital would then result in the creation of prudential buffers in the four Greek banks, keeping thus an adequate level of solvency. Therefore, the Commission concluded that there were no objective elements to indicate that any of the circumstances referred to in point (a), (b) or (c) of Article 32(4)(d) BRRD were met. As regards the circumstances referred to in Article 59(3) BRRD, the Commission noted that all additional Tier 1 and Tier 2 instruments held by the bank were subject to conversion into ordinary shares and would fully contribute to covering capital needs of the bank before State aid was injected.

Concluding remarks

These cases demonstrate that it is possible to grant State aid without triggering the resolution of the bank. However, as has also been remarked in the literature, the three exceptions are quite limited in scope.[123] Thus in most cases, granting State aid would trigger resolution.[124]

A related question is the following: can Member States still grant aid to banks without triggering the write-down and conversion tool? It should be recalled that this tool can be used in combination with the resolution tools or outside a resolution action.[125] The write-down or conversion of capital instruments is required in the situations listed in Art. 59(3) BRRD and Art. 21(1) SRM-Regulation. One of these situations is the situation that extraordinary public financial support is needed, except in any of the circumstances set out in point (d)(iii) of Article 32(4) BRRD and point (d)(iii) of Article 18(4) SRM-Regulation.[126] Thus only a so-called "precautionary recapitalisation" does not trigger the write-down and conversion tool.

4.4.2 State aid to a bank under resolution

Can Member States grant aid to a bank under resolution? Art. 37(10) BRRD provides for the possibility for Member States to grant State aid to banks under resolution. It must be granted through 'government stabilisation tools' and it is

123. Lo Schiavo 2014, p. 449. See also: Lannoo 2014, p. 630-635.
124. For instance, in the decision on CCB (18 December 2015, para. 126), the Commission noted that the capital support for CCB was not of a precautionary nature, because it was aimed at covering a capital shortfall stemming from additional loan loss provisioning.
125. Art. 59(1) BRRD.
126. Micossi, Bruzzone & Cassella 2016.

only possible when there is a bail-in of at least 8%. This means that the shareholders and creditors of the bank have to contribute to loss absorption and recapitalisation (through write down, conversion or otherwise). This contribution should be equal to an amount of at least 8% of total liabilities including own funds.

In addition, Art. 37(10)(b) BRRD stresses that this extraordinary public support is conditional on prior and final approval under the Union State aid framework.[127]

The rules on government stabilisation tools are laid down in article 56-58 BRRD. In art. 56(1) BRRD, it is again underlined that extraordinary public support – through government financial stabilisation tools – must be granted in accordance with art. 37(10) BRRD and the Union State aid framework. Art. 56 (3) BRRD stresses that government financial stabilisation tools may only be used as a last resort.[128]

4.4.3 Relevance of the State aid control framework

Is the State aid control framework still relevant when a bank is rescued under the recovery and resolution-framework? This question should be answered in the affirmative. In the BRRD as well as in the SRM-Regulation, references to the State aid rules can be found. The relevance of the State aid framework is already highlighted in the recitals of the BRRD and SRM-Regulation.

- Recital 47 BRRD underlines that when the use of the resolution tools involves the granting of State aid, interventions have to be assessed in accordance with the Union State aid framework. Recital 47 BRRD further stipulates that State aid may be involved where resolution funds or deposit guarantee funds intervene to assist in the resolution of an ailing bank.
- Recital 55 BRRD stresses that the resolution tools should be applied before any extraordinary public financial support to the bank. Recital 55 BRRD further provides that the use of extraordinary public support, resolution funds or deposit guarantee schemes to assist in the resolution of failing institutions should comply with the rules on State aid.
- Recital 30 SRM-Regulation provides that "where resolution action would involve the granting of State aid pursuant to Article 107(1) TFEU or as Fund aid, a resolution decision can be adopted after the Commission has adopted a positive or conditional decision concerning the compatibility of the use of such aid with the internal market".

127. The Union State aid framework is defined (in point 53 of Article 2(1) BRRD) as: "the framework established by Articles 107, 108 and 109 TFEU and regulations and all Union acts, including guidelines, communications and notices, made or adopted pursuant to Article 108(4) or Article 109 TFEU".
128. As already underlined by recital 55 BRRD.

Already in its Proposal for a SRM-Regulation, the Commission stressed that "within the SRM, the State aid control of the Commission would be preserved in all circumstances".[129]

The procedure concerning State aid and Fund aid is laid down in article 19 SRM-Regulation. Pursuant to Art. 19(3) SRM-Regulation, the SRB shall, to the extent that the resolution action involves the use of the Fund, notify the Commission of the proposed use of the Fund. This notification shall trigger a preliminary investigation by the Commission during the course of which the Commission may request further information from the SRB. Art. 19(3) SRM-Regulation further provides that the Commission shall assess whether the use of the Fund would distort, or threaten to distort, competition by favouring the beneficiary or any other undertaking so as, insofar as it would affect trade between Member States, to be incompatible with the internal market. The Commission shall apply to the use of the Fund the criteria established for the application of State aid rules as enshrined in Article 107 TFEU.

The Commission shall adopt a decision on the compatibility of the use of the Fund with the internal market, which shall be addressed to the SRB and to the national resolution authorities of the Member State or Member States concerned. That decision may be contingent on conditions, commitments or undertakings in respect of the beneficiary.

Art. 44 SRM-Regulation provides that the SRB shall act in compliance with Union law, in particular with the Council and the Commission decisions pursuant to the SRM-Regulation.

Drijber remarked that the State aid rules apply *by analogy* to Fund aid. If Fund aid would directly qualify as State aid, then there would be no need for laying down the procedure in Art. 19 of the SRM-Regulation.[130] Though the terms "by analogy" cannot be found in the SRM-Regulation, the Commission made use of these terms in its Proposal for a SRM-Regulation:

> "Where no State aid is present in the use of the Fund, the criteria established for the application of Article 107 of the TFEU should be applied, *by way of analogy*, as a precondition for the adoption of a decision to place a bank under resolution, in order to preserve the integrity of the internal market between participating and nonparticipating Member States."[131] [Italics mine, *REvL*]

129. SRM proposal, p. 8.
130. Drijber 2015, p. 229.
131. SRM proposal, p. 9.

Consistency between the recovery and resolution framework and the State aid control framework is also ensured as regards the business reorganisation plan. Where the bail-in tool is used to recapitalise the bank, a business reorganisation plan should be drawn up and implemented.[132] Art. 52(1) BRRD provides that this business reorganisation plan should be compatible with the restructuring plan that is required under the State aid framework.[133] Noteworthy is also that in the Delegated Regulation of 10 May 2016, the Commission explicitly indicated that the Crisis Communications "may provide useful reference for the elaboration of the business reorganisation plan even where no State aid has been granted, since they share with the business reorganisation plan the objective of restoring the institution or entity's longterm viability".[134]

4.4.4 Compliance of the aid measure with the intrinsically linked provision of the BRRD

In the Commission decisions that were taken after the adoption of the BRRD, the Commission assessed whether the aid measures violated intrinsically linked provision of the BRRD. Even if the Member State had not yet transposed the BRRD into national law and the respective provisions on bail-in, the Commission needed to assess whether the aid measures violated indissolubly linked provisions of the BRRD.[135] This obligation follows from the case-law from the Court of Justice EU.[136] In that regard, the Court has held the following: "While the Commission has a wide discretion when it determines the compatibility of a system of aid with the common market, it is none the less required to ensure, in the context of that assessment, that the procedure does not produce a result which is contrary to specific provisions of the Treaty other than those of Articles 87 EC and 88 EC, in particular where those aspects of aid which contravene those provisions are so indissolubly linked to the object of the aid that it is impossible to evaluate them separately."

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132. Art. 51 BRRD.
133. See also Art. 27(16) SRM-Regulation which refers to Art. 52 BRRD.
134. See recital 2 of the Delegated Regulation of 10 May 2016.
135. CCB, SA.43367, 18 December 2015, para. 122.
136. MKB Bank, 16 December 2015, para. 132; CCB, 18 December 2015, para. 123; Banif, 21 December 2015, para. 193. These decisions refer to the judgments in the cases 74/76 (para. 14), C-134/91 (para. 20), T-184/97 (para. 55), T-289/03 (para. 313-314).

Thus, an aid measure cannot be deemed compatible when it violates intrinsically linked provisions of the BRRD. In the bank State aid decisions that were adopted since 2015, the following provisions of the BRRD were identified as intrinsically linked to the specific aid measure under examination:

– Article 32(4)(d) BRRD.[137] This provision concerns one of the conditions for resolution; i.e. the condition that the bank is 'failing or likely to fail'.
– Article 34(1)(a) BRRD.[138] This provision concerns burden-sharing by shareholders.
– Article 36 BRRD.[139] This provision concerns the valuation.
– Article 37(5) BRRD.[140]
– Article 38 and 39 BRRD.[141] This provision concerns one of the resolution tools.
– Article 42 BRRD.[142] This provision concerns one of the resolution tools.
– Article 44(5) BRRD.[143] This provision concerns the contribution by the resolution financing arrangement.
– Article 59(3) BRRD.[144] This provision concerns the write-down and conversion tool.
– Article 100(5) BRRD.[145] This provision concerns the requirement to establish resolution financing arrangements.
– Article 101(1) BRRD.[146] This provision concerns the use of the resolution financing arrangements.
– Article 109 BRRD.[147] This provision concerns the use of deposit guarantee schemes in the context of resolution.

137. Alpha Bank, 26 November 2015, para. 125.
138. Panellinia Bank, 16 April 2015, para. 111; MKB Bank, 16 December 2015, para. 135; CCB, 18 December 2015, para. 124.
139. CCB, 18 December 2015, para. 128.
140. Banif, 21 December 2015, para. 197.
141. Panellinia Bank, 16 April 2015, para. 112; Banif, 21 December 2015, para. 197.
142. MKB Bank, 16 December 2015, para. 137; Banif, 21 December 2015, para. 197.
143. Reintroduction of the winding-up scheme, compensation scheme, Model I and Model II, SA.40029, 13 February 2015, para. 25.
144. Reintroduction of the winding-up scheme, compensation scheme, Model I and Model II, SA.40029, 13 February 2015, para. 25.
145. Panellinia Bank, 16 April 2015, para. 111.
146. MKB Bank, 16 December 2015, para. 138.
147. Prolongation of the winding-up scheme, compensation scheme, Model I and Model II, SA.42405, 18 September 2015, para. 37.

In the bank State aid decisions that were adopted since 2015, the Commission concluded that the aid measures in question did not seem to violate the intrinsically linked provisions of the BRRD.[148]

4.4.5 Interaction between State aid and resolution

How to deal with an ailing bank? In essence, there are three possibilities: i) a bank can be put in resolution and receive State aid, ii) a bank can be put in resolution without receiving State aid, or iii) a bank can receive State aid without being put in resolution.

State aid and resolution

The case of the Magyar Kereskedelmi Bank (MKB Bank) can serve as an illustration of a case that is characterised by both State aid and resolution. In December 2014, the Hungarian resolution authority, *Magyar Nemzeti Bank*, decided to put MKB Bank in resolution. As part of the resolution, Hungary decided to apply the asset separation tool, according to which the problematic assets of MKB Bank would be transferred to the Resolution Asset Management Vehicle (RAMV). The Commission considered that the transfer of impaired assets to the RAMV constituted State aid. In its decision of 16 December 2015, the Commission authorised the State aid to MKB Bank.

Resolution without (granting) State aid

Heta Asset Resolution ("Heta")[149] has the dubious honour of being the first bank to undergo resolution under the BRRD. In 2015, a capital shortfall of 7,6 billion EUR was revealed by an AQR. The Austrian State decided not to rescue Heta.[150] Consequently, in March 2015, the *FinanzMarktAufsicht* (FMA) – in its capacity as resolution authority – decided to put Heta in resolution.[151] NB: since no State aid was involved, there is no Commission decision on the resolution of Heta.

An illustration of a resolution 'by-the-book' can be found in the case of Banco Popular Español. The SRB concluded that the resolution conditions were met.[152] On 7 June 2017, Banco Popular Español was put in resolution. Under

148. The conclusion that the aid does not violate intrinsically linked provisions of the BRRD is without prejudice to the prerogative of the Commission to initiate infringement procedures against a Member State for breach of Union law, including breach of the provisions of the BRRD. This was explicitly indicated by the Commission in its decision on MKB Bank (16 December 2015, para. 140) and in its decision on CCB (18 December 2015, para. 131).
149. Heta was the 'bad bank' that resulted from the rescue and restructuring of Hypo Alpe Adria.
150. See the blog by Gandrud & Hallerberg, 'Not SIFIs but PIFIs', Bruegel 6 March 2015.
151. The German version of this ruling is available on the website of the FMA, while an English translation of this ruling is available on the website of Heta.
152. On 6 June 2017, the ECB had concluded that Banco Popular was 'failing or likely to fail'.

the resolution scheme, Banco Popular Español was sold to Banco Santander. All the existing shares were written down, while the Tier 2 instruments were converted into new shares, which were transferred to Banco Santander for the price of EUR 1. The case of Banco Popular Español did not involve State aid, so there is no State aid decision on Banco Popular Español. Nevertheless, there is a Commission decision: pursuant to Art. 18(7) SRM-Regulation, the Commission has approved the resolution of Banco Popular Español.[153]

State aid without (triggering) resolution

In principle, State aid triggers resolution. As a result, some Member States have become reluctant to grant State aid, since this would trigger resolution and the application of the bail-in tool. This is illustrated by the case of Italy in 2016 when Monte dei Paschi di Siena (MPS) experienced serious difficulties. A resolution would likely entail bail-in of junior and senior creditors.[154] Since many creditors of Italian banks were families and small investors rather than professional investors, Italy wanted to avoid a bail-in of these investors. In 2016, a solution was found which did not involve State aid to MPS.[155] However, in December 2016, this solution proved to be unfeasible: the private capital raise failed. Italy then decided to grant State aid in the form of a "precautionary recapitalisation". As explained in section 4.4.1, a precautionary recapitalisation within the meaning of Art. 18(4)(d)(iii) SRM-Regulation does not trigger the resolution of the bank. Following negotiations between Italy, the Commission and the ECB, an agreement in principle was reached on 1 June 2017 between Italy and the Commission.[156] On 4 July 2017, the Commission authorised the State aid to MPS.[157]

Another noteworthy case is the case of Banca Popolare di Vicenza and Veneto Banca. Italy decided to grant State aid to wind-down Banca Popolare di Vicenza and Veneto Banca. On 25 June 2017, the Commission authorised the State aid.[158] An interesting aspect of this case is that the State aid did not trigger the

153. See press release IP/17/1556 (available at http://europa.eu/rapid/press-release_IP-17-1556_en.htm).
154. IMF 2016 Article IV Report, p. 25.
155. It was decided that MPS would raise EUR 5.000 million of capital. In addition, Atlas/Atlante would free MPS of its non-performing loans.
156. See Commission STATEMENT/17/1502 (available at http://europa.eu/rapid/press-release_STATEMENT-17-1502_en.htm).
157. Unfortunately, the public version of this decision is not yet available. Consequently, the only information can be found in the press release. See IP/17/1905 (available at http://europa.eu/rapid/press-release_IP-17-1905_en.htm).
158. Unfortunately, the public version of this decision is not yet available. Consequently, the only information can be found in the press release. See IP/17/1791 (available at http://europa.eu/rapid/press-release_IP-17-1791_en.htm).

resolution of these banks. Although the criterion of 'failing or likely to fail' was met, the SRB decided not to take resolution action with respect to these two banks. The SRB considered that the resolution was not necessary in the public interest.[159] As a result, the third resolution criterion was not met. Banca Popolare di Vicenza and Veneto Banca would be liquidated under Italian insolvency law.

While the Italian banks thus 'escaped' resolution (and the subsequent application of the bail-in tool), it should be recalled that a bailout does not necessarily mean that investors are spared. Indeed, the State aid rules require burden-sharing by shareholders and subordinated creditors. For these investors, there is no real difference between a resolution and bail-in on the one hand and a bailout with full burden-sharing on the other hand. Only with respect to senior creditors, there is a difference between a bailout and a resolution of a bank.

4.5 ESM

4.5.1 Background of the ESM

The purpose of the European Stability Mechanism (ESM) is to grant stability support to Euro-area Member States. The ESM is the successor of the EFSF (European Financial Stability Facility). Whereas the EFSF was temporary, the ESM is a permanent mechanism.

When was the ESM created? There is not one single date; rather, the ESM was the result of several successive steps.[160] On 17 December 2010, the European Council agreed on the need for Euro-area Member States to establish a permanent stability mechanism.[161] Subsequently, on 25 March 2011, the European Council adopted Decision 2011/199/EU amending Article 136 TFEU.[162] On 2 February 2012 the Euro-area Member States signed the ESM Treaty. The ESM become operational on 8 October 2012.[163]

159. See the SRB press release of 23 June 2017 (available at https://srb.europa.eu/en/node/341).
160. Another milestone for the ESM was 27 November 2012. On that date, the legality of the ESM was confirmed by the CJEU in its judgment in the case C-370/12 (Pringle).
161. On 28 November 2010, the Ministers of Finance of the Euro area Member States already agreed on the establishment of the ESM.
162. The following paragraph was added to Article 136 TFEU: "3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."
163. The EFSF and the ESM functioned concurrently from 8 October 2012 until 30 June 2013.

4.5.2 ESM direct recapitalisation instrument

The ESM provides financial assistance to Member States in the Eurozone. In some cases, the ESM indirectly recapitalised banks. For instance, in 2012, the ESM granted a loan to Spain, which in turn used these funds to recapitalise its banks. Art. 15(1) of the ESM Treaty provides that the ESM may grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalising the financial institutions of that ESM Member. Art. 15(3) of the ESM Treaty is also of relevance, since this provision refers to Articles 107 and 108 TFEU.

The Banking Union allows for a rescue of banks at EU-level: the Euro Area Summit Statement of 29 June 2012 held that the ESM should get the possibility to recapitalise banks directly. However, if banks are rescued/supported at EU-level, then banking supervision should also be transferred to EU-level.[164] In order words: the SSM was a precondition for the direct recapitalisation by the ESM.

The direct recapitalisation instrument (DRI) was intended to break the vicious circle between banks and governments. However, because of the introduction of the bail-in tool and the national resolution financing arrangements/the Single Resolution Fund, the DRI is less likely to be used.[165] It has even been remarked that "the prospects for ESM direct recapitalisation were later shrunk to the point of near-meaninglessness".[166]

<u>*DRI and the recovery and resolution framework*</u>

As regards the relation between the DRI and the recovery and resolution framework, the provisions of Art. 8 of the ESM Guideline on Financial Assistance for the Direct Recapitalisation of Institutions (hereinafter: "ESM Guideline") are of importance.

In the first place, Art. 8(1) of the ESM Guideline stipulates that the DRI cannot be used as a "precautionary recapitalisation" in the sense of Art. 32(4)(d)(iii) BRRD or Article 18(4)(d)(iii) SRM-Regulation. Consequently, the DRI would most likely trigger resolution.

In the second place, a precondition for the use of the DRI is that a bail-in of at least 8% has to be applied. In addition, there must be a contribution from the resolution financing arrangement of at least 5%. Moreover, all unsecured, non-preferred liabilities, other than eligible deposits, must be written down or be

164. Bovenschen et al. 2013, p. 364.
165. See question 3 of the FAQ on the ESM direct recapitalisation instrument. See also: Lo Schiavo 2014, p. 451-456.
166. Schoenmaker & Véron 2016, p. 2.

converted in full. These three preconditions follow from Art. 8(3) of the ESM Guideline.[167] Similar conditions can be found in the BRRD and the SRM-Regulation. Art. 44(7) BRRD and Art. 27(9) SRM-Regulation provide that in extraordinary circumstances, further funding may be sought from alternative financing sources.[168] There are, however, two preconditions: firstly, the 5% limit of the contribution of the SRF should be reached; and secondly, all unsecured, non-preferred liabilities, other than eligible deposits, should be written down or converted in full.

DRI and the State aid control framework

As regards the relation between the DRI and the State aid control framework, the question could arise whether State aid rules also apply to the ESM direct recapitalisation instrument. After all, if the ESM recapitalises banks *directly*, is the recapitalisation imputable to the Member State? The Euro Area Summit Statement of 29 June 2012 leaves little room for doubt as to the applicability of the State aid rules:

> "When an effective single supervisory mechanism is established, involving the ECB, for banks in the euro area the ESM could, following a regular decision, have the possibility to recapitalize banks directly. This would rely on appropriate conditionality, *including compliance with state aid rules*, which should be institution-specific, sector-specific or economy-wide and would be formalised in a Memorandum of Understanding."[169] [Italics mine, *REvL*]

The relevance of the State aid rules to the DRI was reiterated in the following statement:

> "The decision of the Commission approving the assistance and *setting out the State aid conditionality* is a prerequisite for the disbursement of financial assistance in the form of direct recapitalisation."[170] [Italics mine, *REvL*]

167. See also question 11 of the FAQ on the ESM direct recapitalisation instrument.
168. In that regard, Art. 30(6) SRM-Regulation provides that the SRB shall endeavour to cooperate closely with any public financial assistance facility including the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), in particular in the extraordinary circumstances referred to in Article 27(9) and where such a facility has granted, or is likely to grant, direct or indirect financial assistance to entities established in a participating Member State.
169. Euro Area Summit Statement of 29 June 2012.
170. ESM, 'ESM direct bank recapitalisation instrument; main features of the operational framework and way forward', 20 June 2013.

Art. 1(3) of the ESM Guideline provides that the DRI shall be provided *in accordance with the State aid provisions* under Art. 107 and 108 TFEU. Consequently, the intention to grant aid under the DRI has to be notified to the Commission.[171] Since the State aid rules apply to the DRI, a restructuring plan is required for banks that benefit from the DRI.[172] Pursuant to Art. 4(5) of the ESM Guideline, the ESM shall, jointly with the institution(s) and the ESM Member concerned, draw up a restructuring plan. This, once again, underlines the significance of the State aid rules in case of a direct recapitalisation by the ESM.

4.6 Conclusion

The main message of the present chapter is that – notwithstanding the introduction of the BRRD, SRM and DRI – State aid to banks remains relevant, the State aid control framework remains relevant and this PhD-study remains relevant.

State aid to banks remains relevant
Does State aid to banks have a future? It can be argued that Member States have become reluctant to grant State aid, since State aid would trigger resolution and the application of the bail-in tool. However, it should be recalled that the BRRD allows for some flexibility for Member States that wish to rescue banks without bailing-in creditors. As explained in section 4.4.1, there are three situations in which it is possible to grant State aid without triggering resolution. The most notable exception is the "precautionary recapitalisation" within the meaning of Art. 32(4)(d)(iii) BRRD or Art. 18(4)(d)(iii) SRM-Regulation. In that regard, the cases of Alpha Bank, Eurobank, Piraeus Bank and NBG (discussed in subsection 4.4.1) and MPS (discussed in subsection 4.4.5) have demonstrated that a "precautionary recapitalisation" is not only a hypothetical possibility, but a real possibility that has been applied in practice.

The State aid control framework remains relevant
The present chapter has shown that all forms of assistance have to comply with the State aid control framework.

– In case a Member State grants an aid measure that does not trigger resolution, it shall be conditional on final approval under the Union State aid framework. This follows from Art. 32(4)(d) BRRD.

171. Art. 4(4) of the ESM Guideline on Financial Assistance for the Direct Recapitalisation of Institutions.
172. See question 8 of the FAQ on the ESM direct recapitalisation instrument.

– In case a Member State grants extraordinary public financial support through government stabilisation tools, it shall be conditional on prior and final approval under the Union State aid framework. This follows from Art. 38(10) and Art. 56(1) BRRD.
– In case resolution funds are used, it should comply with the relevant State aid provisions. This follows from recital 55 BRRD.
– In case the Single Resolution Fund (SRF) is used, the Commission shall apply to the use of the Fund the criteria established for the application of State aid rules as enshrined in Article 107 TFEU. This follows from Art. 19 SRM-Regulation.
– In case the ESM direct recapitalisation instrument (DRI) is used, it shall be in accordance with the State aid provisions under Art. 107 and 108 TFEU. This follows from Art. 1(3) of the ESM Guideline on Financial Assistance for the Direct Recapitalisation of Institutions.

This PhD-study remains relevant
As set out in chapter 1, the aim of this PhD-study is forward-looking. It is about providing a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. If there were no bank State aid decisions in the future, then this PhD-study would lose most of its relevance. However, as set out above, State aid to banks remains relevant and the State aid control framework remains relevant. As a consequence, this PhD-study remains relevant.

Chapter 5. Case-law of the Court of Justice EU on bank State aid

5.1 Introduction

5.1.1 The role of the Court of Justice EU

While this PhD-study focusses on the State aid control of the European Commission, the present chapter highlights the role of another important European institution: the Court of Justice of the European Union (CJEU). In fact, there are two Courts, for the Court of Justice of the European Union is one *institution* consisting of two *judicial bodies*: the Court of Justice and the General Court. What is the role of the CJEU in bank State aid cases? In essence, there are two ways in which the CJEU can be involved in these cases. In the first place, the CJEU can be asked to review the legality of the Commission decisions. In the second place, the CJEU can be asked to give a preliminary ruling. Both procedures are set out below.

Action for annulment

The Commission decisions are subject to judicial review by the Court of Justice of the European Union. Article 263 TFEU provides for an action for annulment.[1] Under this procedure, the General Court can be asked to review the legality of a Commission decision. If the General Court considers that the Commission decision violates higher-ranking rules of EU law[2], then it declares the Commission decision to be void (pursuant to Art. 264 TFEU).

It is, however, worth stressing that judicial review of the Commission's State aid decisions is limited. The Court has held that "for the purposes of applying Article 87(3) EC the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment in the matter

1. For a detailed discussion of the action for annulment, see: Lenaerts, Maselis & Gutman 2014, p. 253-418.
2. Art. 263 TFEU provides for the following four grounds on which the validity of the decision can be contested: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

for that of the competent authority but must confine itself to examining whether the authority's assessment is vitiated by a manifest error or by misuse of powers".[3]

Another question is: who can challenge Commission decisions before the General Court? This question concerns the admissibility and – as will be discussed in this chapter – it has been an important issue in several bank State aid cases.

Reference for a preliminary ruling

It should be pointed out that State aid measures may be challenged *before a national court*. For instance, when the Dutch State nationalised SNS REAAL, it did so by expropriating the shareholders and subordinated debt holders of the bank. Some of these investors brought an action before the *Raad van State* (the Dutch Council of State) – in order to challenge the lawfulness of the expropriation – and before the *Ondernemingskamer* (the Enterprise Division) – in order to challenge the fact that the expropriated investors received no compensation. This illustrates that State aid may give rise to proceedings before national courts.

When in proceedings before a national court questions arise about the interpretation of the EU Treaties or on the validity and interpretation of a Commission decision, then the national court may – pursuant to Art. 267 TFEU – request the Court of Justice to give a preliminary ruling. In the preliminary ruling, the Court of Justice answers the questions and thus provides clarity on the interpretation of EU law. The preliminary ruling procedure is aimed at avoiding divergent interpretations of EU law in each Member State.[4] Since the Court of Justice can be requested by a national court to review the validity of a Commission decision, the preliminary ruling procedure provides for an indirect route to challenging a bank State aid decision.[5]

5.1.2 The purpose(s) of this chapter

This chapter has a twofold purpose. In the *first* place, the purpose of this chapter is to give an overview of the case-law on bank State aid.[6] How many cases are there? Who brought proceedings and why? And what were the main issues in

3. See Case C-148/04, para. 71. See also: Sutton, Lannoo & Napoli 2010, p. 29-30; Psaroudakis 2012, p. 205 (footnote 56).
4. For a detailed discussion of the preliminary ruling procedure, see: Lenaerts, Maselis & Gutman 2014, p. 48-106, 215-249 and 456-479.
5. For the interplay between the direct action for annulment and the indirect way of the preliminary reference procedure, see: Lenaerts, Maselis & Gutman 2014, p. 465-467 and 475.
6. The purpose is not to give a *detailed* account of each bank State aid case. This would not be feasible, since the judgments are often quite extensive. For instance, the judgment in Case T-457/09 comprises no less than 424 recitals (which roughly corresponds to 67 pages).

these cases? These questions will be answered in sections 5.2 to 5.19. In particular, sections 5.2 to 5.18 provide a brief description of each case, while the concluding observations can be found in section 5.19.

Interestingly, there are some cases in which the applicant claimed that the Commission had infringed the principle of equal treatment. The *second* purpose of this chapter is therefore to discuss how the Court has interpreted the principle of equal treatment. This will take place in section 5.20. This constitutes the prelude to chapter 6 (in which other interpretations of the principle of equal treatment will be discussed).

5.2 The case of ING

Joined Cases T-29/10 and T-33/10, Kingdom of the Netherlands and ING Groep NV v. European Commission; C-224/12 P, Commission v. Kingdom of the Netherlands and ING Groep NV.

The main issue in the case of ING concerned the *private investor principle*. The essence of the private investor test is that the behaviour of the State is compared to that of a hypothetical private investor. If the State acts like a private investor would do (under similar circumstances), then the measure contains no aid-element. Consequently, the measure does not constitute State aid and falls outside the scope of the prohibition of Art. 107(1) TFEU.[7]

In November 2008, ING received a capital injection from the Netherlands. This capital injection was not made in the form of ordinary shares, but in the form of Core Tier 1 securities (which have to be repaid eventually). At the time of the capital injection, the Netherlands and ING agreed on the terms for repaying the capital injection. However, a few months later, the Netherlands and ING amended these repayment terms. The Commission considered that the amended repayment terms were more favourable to ING than the original repayment terms. Therefore, in the decision on ING of 18 November 2009 ("the ING-decision"), the amendment of the repayment terms was classified as additional State aid. Both the Netherlands and ING challenged the ING-decision by bringing an action for annulment: joined cases T-29/10 and T-33/10. The Netherlands and ING criticised the classification of the amendment of the repayment terms as additional State aid. According to ING and the Netherlands, the modification of the repayment terms did not constitute State aid. They argued that the Commission should have applied the private investor test.

7. An in-depth discussion of the private investor principle was provided in section 2.3.3.

On 2 March 2012, the General Court rendered its judgment. The General Court considered that State aid may have been granted both on the making of the capital contribution, and on the amendment to the repayment terms, if it becomes apparent that the State did not act in each of those situations as a private investor in a similar situation would have done.[8] Thus, the Commission cannot evade its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor principle solely on the ground that the capital injection subject to repayment already itself constitutes State aid.[9]

The Commission lodged an appeal against the judgment of the General Court. In its judgment of 3 April 2014, the Court rejected all the grounds of appeal and dismissed the appeal dismissed in its entirety. In particular, the Court considered that the application of this case-law cannot be compromised merely because the ING-case concerns an amendment to the conditions for the redemption of securities acquired in return for state aid.[10] Any holder of securities may wish or agree to renegotiate the conditions of their redemption. It is therefore meaningful to compare the behaviour of the State in that regard with that of a hypothetical private investor in a comparable position.[11] The Court concluded that the General Court had not erred in law.[12]

5.3 The case of FIH

Case T-386/14, FIH Holding A/S and FIH Erhvervsbank A/S v. Commission; C-579/16 P, Commission v. FIH Holding and FIH Erhversbank

The main issue in the case of FIH concerned the *private investor principle*. According to the applicants in this case, the Commission should have applied the market economy *creditor* principle. By contrast, the Commission claims to have applied the correct test, namely, the market economy *investor* principle.

8. Joined Cases T-29/10 and T-33/10 (Netherlands and ING Group v Commission), para. 98.
9. Joined Cases T-29/10 and T-33/10 (Netherlands and ING Group v Commission), para. 99.
10. Case C-224/12 (Commission v Netherlands and ING Group), para. 34.
11. Case C-224/12 (Commission v Netherlands and ING Group), para. 35.
12. For more information on this case, see: R.E. van Lambalgen & E. Oude Elferink, 'Gevoegde zaken T-29/10 en T-33/10, Koninkrijk der Nederlanden en ING Group NV t. Commissie', *SEW* 2012, p. 153-154; M.G.A.M. Custers, *JOR* 2012/147; M.R. Mok, *NJ* 2012/192; Drijber 2012; Fanoy & Plomp 2012; Van Lambalgen 2014a; Van Lambalgen 2014b; Ludding 2012; Lund & Petterson 2013; Slot 2012.

FIH is a Danish bank. In 2009, FIH received State aid under the Danish support scheme. In particular, FIH received a hybrid tier 1 capital injection of DKK 1.9 billion (approximately EUR 225 million) and it benefited from a State guarantee. These aid measures were approved as compatible aid.[13]

In 2012, Denmark adopted further measures in favour of FIH: the most problematic assets of FIH were to be transferred to NewCo, a new subsidiary of FIH Holding. Subsequently, the Financial Stability Company (FSC)[14] was to buy the shares in NewCo, which would be wound up in an orderly manner thereafter. The measures thus effectively amounted to a transfer of impaired assets. In its decision on FIH of 11 March 2014 ("the FIH-decision"), the Commission held that these measures in favour of FIH constituted State aid within the meaning of Article 107(1) TFEU. In particular, the Commission considered that these measures did not observe the principle of the market economy investor, since no market economy operator would have invested in NewCo on equivalent terms and conditions.

FIH and its holding company (FIH Holding) brought an action for annulment against the FIH-decision. According to the applicants, the Commission should have applied the market economy creditor principle instead of the market economy investor principle. The applicants argued that the Commission failed to take into consideration the pre-existing risk for Denmark of suffering very large losses on the DKK 1.9 billion hybrid tier 1 capital injection and the DKK 42 billion in State guaranteed bonds issued by FIH. According to the applicants, the transfer of assets was intended to remove this risk.

On 15 September 2016, the General Court rendered its judgment. The General Court considered that it may be economically rational for Denmark to accept measures such as a transfer of impaired assets, in so far as they have a limited cost and involve reduced risk and that, without such measures, it would be highly likely that it would have to bear losses in an amount greater than that cost. The General Court held that the Commission had applied an incorrect legal test, namely, the market economy investor principle, instead of examining the measures in the light of the market economy creditor principle. The General Court considered that Denmark's conduct, when it adopted the measures at issue in 2012, could not be compared to that of an investor seeking to maximise its profit, but that of a creditor seeking to minimise the losses to

13. Commission Decision of 3 February 2009 on State aid scheme N31a/2009 – Denmark.
14. The Financial Stability Company ('the FSC') is a public body set up by the Danish authorities in the context of the financial crisis.

which it is exposed in the event of inaction. The General Court therefore concluded that the Commission committed an error in law in applying an incorrect legal test.[15]

5.4 The case of ABN AMRO

Case T-319/11, ABN AMRO Group NV v. Commission

This case revolved around the *acquisition ban* that was imposed on ABN AMRO. On 5 April 2011, the Commission adopted a decision on ABN AMRO ("the ABN AMRO-decision"). This decision included an acquisition ban for a period of three years, with the exception however of acquisitions of specified types and of a specified minimum size. That ban would be extended to five years if the Dutch State continued to own more than 50% of ABN AMRO at the end of three years.

ABN AMRO brought an action for annulment against that decision. In support of the action, ABN AMRO relied on two pleas in law. In its first plea, it challenged the *scope* of the acquisition ban imposed on it. In its second plea, it contested the *duration* of the prohibition. In particular, ABN AMRO alleged an infringement of Article 107(3)(b) TFEU and a misapplication of the Crisis Communications, an infringement of the principle of proportionality, an infringement of the principle of equal treatment and an infringement of the principle of good administration, together with a failure to state reasons under Article 296 TFEU. In the context of this PhD-study, the plea alleging an infringement of the principle of equal treatment is most interesting. As will be discussed in section 5.20.1, this plea in law was rejected by the General Court. The other pleas in law were also rejected. Consequently, the action for annulment was dismissed in its entirety by the General Court in its judgment of 8 April 2014.[16]

15. For a more detailed summary of this judgment, see: R.E. van Lambalgen & E. Oude Elferink, 'Zaak T-386/14, FIH Holding A/S en FIH Erhvervsbank A/S t. Commissie', *SEW* 2016, p. 440-441. See also: Cyndecka 2017.
16. For a more detailed summary of this judgment, see: R.E. van Lambalgen & E. Oude Elferink, 'Zaak T-319/11, ABN AMRO Group NV t. Commissie', *SEW* 2014, p. 296-297.

5.5 The case of WestLB

Case T-457/09, Westfälisch-Lippischer Sparkassen- und Giroverband v. Commission

This case concerned the State aid to WestLB. An important aspect of this case is that the action for annulment was not brought by the bank or the Member State, but by one of the shareholders of the bank.

The background of the case was as follows. The decision on WestLB of 12 May 2009 ("the WestLB-decision") included an obligation for the owners of WestLB to sell WestLB to an unconnected third party (hereafter: "the obligation to sell"). In the opening decision, the Commission had already noted that the difficulties of WestLB were probably due to its ownership structure and to the different interests among the owners and expressed its doubts as to the possibility of an appropriate strategic reorientation in the absence of a solution to those structural issues. Westfälisch-Lippischer Sparkassen- und Giroverband was one of the owners of WestLB and brought the present action for annulment.[17]

On 17 July 2014, the General Court rendered its judgment.[18] One of the major questions in this case was whether the action was admissible. Since the WestLB-decision was addressed only to the Member State, the applicant would only have standing to bring proceedings if it was directly and individually concerned by that decision.

In that regard, the General Court noted that the applicant had an interest in bringing proceedings separate from that of WestLB as regards the obligation to sell. Indeed, that obligation applied only to the owners, who were forced to waive their property rights in WestLB in order for the aid granted to that bank to be authorised. WestLB, however, was not required to take any action under that obligation, which did not affect its assets and had no bearing on its conduct on the market. However, as regards the other conditions attaching to the WestLB-decision, including those relating to the reduction of WestLB's balance sheet, the General Court noted that they related to the commercial activity of

17. The applicant also requested interim measures. By order of 18 March 2011 in Case T-457/09 R, the application for interim measures was dismissed.
18. This case was assessed by the First Chamber *in its Extended Composition*. The extended composition underlines the importance of this case. In essence, there are several indicators of the importance of a judgment. In the first place, the composition of the chamber indicates the importance that the Court attaches to a case. In the second place, judgments that are considered important are translated into all the EU-languages. In the third place, there is usually a press release ("communiqué de presses") in important cases.

that bank and the sale or liquidation of its assets. WestLB could itself put forward any argument, in the context of an action brought against the WestLB-decision, relating to the unlawfulness or to the absence of necessity for those conditions.[19]

The Court held that, as regards the conditions attaching to the WestLB-decision other than the obligation to sell, the applicant's interest in bringing proceedings was indissociable from that of WestLB and, therefore, it was not individually concerned by the WestLB-decision. However, the applicant was individually concerned by that decision in so far as authorisation of the guarantee at issue was made subject to compliance with the obligation to sell.[20]

Consequently, the pleas put forward by the applicant were admissible only in so far as they were intended to show that the inclusion of the obligation to sell in the WestLB-decision was unlawful.

In support of its application, the applicant submitted eight pleas in law. Those pleas alleged infringement, first, of the principle of collegiality, secondly, of Article 87(1) EC, since the distortion of competition caused by the guarantee at issue was not examined, thirdly, of Article 87(3)(b) EC, fourthly, of the principle of proportionality, fifthly, of the principle of equal treatment, sixthly, of Article 295 EC, seventhly, of Article 7(4) of the Procedural Regulation, and, eighthly, of the obligation to state reasons. All these pleas were rejected as unfounded by the General Court. In the context of this PhD-study, the plea alleging an infringement of the principle of equal treatment is most interesting. This plea in law will be discussed in section 5.20.2.

5.6 The case of HSH Nordbank

Case T-499/12, HSH Investment Holdings Coinvest-C Sàrl and HSH Investment Holdings FSO Sàrl v. Commission

This case concerned the State aid to HSH Nordbank. HSH Nordbank was owned by the City State of Hamburg and the State of Schleswig-Holstein (the "Länder") and several minority shareholders. A major question of this case

19. Case T-457/09, para. 115-117.
20. Case T-457/09, para. 120. Another interesting aspect of this case is that the decision of 12 May 2009 (i.e. the contested decision) was repealed by the decision of 20 December 2011. In that regard, the Court noted that the applicant was subject to the obligation to sell for a period of more than two years. Admittedly, that obligation was not enforced in practice. However, the General Court noted that the applicant retained an interest in seeking annulment of the contested decision in that that obligation was attached to it. Against that background, the applicant retained an interest in having the contested decision found to be unlawful. See: Case T-457/09, para. 123-145.

concerned the *admissibility* of the action for annulment, since the action was brought not by the beneficiary bank itself, but by two minority shareholders of the beneficiary bank.

On 12 November 2015, the General Court rendered its judgment. As regards the admissibility, the General Court made a distinction between the first part and the second part of the application. In the second part of the application, the applicants sought the annulment of the HSH Nordbank-decision *in its entirety*. In that regard, the General Court held that the applicants had not shown that they had an interest in bringing proceedings separate from that of HSH Nordbank. Therefore, they could not be considered to be individually concerned for the purposes of the fourth paragraph of Article 263 TFEU.[21] The second part of the action was therefore declared inadmissible.

The General Court then assessed the admissibility of the first part of the action, in which the applicants sought the *partial* annulment of the HSH Nordbank-decision, in so far as, by that decision, the Commission had imposed obligations on the applicants as minority shareholders.

These obligations had the following background. In 2009, HSH Nordbank received State aid in the form of a EUR 3 billion recapitalisation (which took place in the form of ordinary shares with voting rights). An important feature of the recapitalisation was that only the Länder injected capital into HSH Nordbank; the minority shareholders did not participate in the recapitalisation. As a result, they were diluted. However, in its Opening Decision on HSH Nordbank, the Commission considered that the issue price of the State recapitalisation was too high and that consequently, the minority shareholders benefited disproportionately by not being completely diluted.[22] Therefore, in the final decision ("the HSH Nordbank-decision"), the Commission took into account several additional burden-sharing measures. This additional burden-sharing was achieved by means of a capital increase in exchange for a lump-sum payment of EUR 500 million. Firstly, HSH Nordbank had to make a payment of EUR 500 million to HSH Finanzfonds (which was owned and controlled by the Länder). Secondly, at the same time that amount was used by HSH Finanzfonds to acquire new shares in HSH Nordbank, thus increasing its shareholding in that undertaking. Thirdly, that capital increase for the sole benefit of HSH Finanzfonds automatically reduced the stake held by the other shareholders, including the applicants. In other words: they were diluted.

21. According to settled case-law, an applicant must show that it has an interest in bringing proceedings separate from that possessed by an undertaking which it partly controls and which is concerned by a European Union measure. Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the undertaking which itself has a right of action. See: Case T-499/12, para. 31.
22. HSH Nordbank, 22 October 2009, para. 72.

By the HSH Nordbank-decision, the minority shareholders were banned from acquiring new shares. The General Court held that this ban adversely affected the applicants' property rights, since the minority shareholders of HSH Nordbank were prohibited from retaining their relative shareholding in the capital of HSH Nordbank. As a result, the General Court concluded that the applicants had established that they had an interest in bringing proceedings separate from that of HSH Nordbank. The action was therefore admissible since the applicants were directly and individually concerned by the HSH Nordbank-decision in so far as one of the conditions set by the Commission was to increase HSH Nordbank's capital for the sole benefit of HSH Finanzfonds.

As regards substance, the applicants questioned the validity of the Commission's position on the possible existence of indirect aid in favour of the minority shareholders of HSH Nordbank. In that regard, the General Court held that the Commission had taken into account all the relevant facts and had not made a manifest error of assessment in considering that the issue price of EUR 19 per share was too high and that this had to be compensated by additional burden sharing among the shareholders.[23] The action for annulment was therefore dismissed.[24]

5.7 The case of BayernLB

Case T-427/12, Austria v. Commission

This case involved two banks: the German BayernLB (Bayerische Landesbank) and the Austrian HGAA (Hypo Group Alpe Adria). HGAA was a subsidiary of BayernLB, until 23 December 2009, when HGAA was nationalised by the Austrian State. In the context of this nationalisation, it was agreed that BayernLB would continue to provide intra-group funding of EUR 2,638 billion to HGAA until the end of 2013. BayernLB received a guarantee from Austria that this amount would be reimbursed (hereafter: "funding guarantee").

In the decision on BayernLB ("the BayernLB-decision"), the Commission held that the funding guarantee granted to BayernLB by Austria constituted State aid.[25] The Commission considered that without the granting of the funding guarantee, BayernLB would probably have lost a large part of the funding it had provided to HGAA. Indeed, HGAA was in a distressed situation and the funding guarantee relieved BayernLB from the credit risk on its funding to HGAA.

23. Case T-499/12, para. 103.
24. For a more detailed summary of this judgment, see: R.E. van Lambalgen & E. Oude Elferink, 'Zaak T-499/12, HSH Investment Holdings Coinvest-C Sàrl en HSH Investment Holdings FSO Sàrl t. Commissie', *SEW* 2016, p. 25-26.
25. BayernLB, 5 February 2013, para. 131.

Austria brought an action for the annulment of the BayernLB-decision in so far as it concerned the funding guarantee. Austria claimed that it never had the intention of granting State aid to BayernLB. It claimed, in particular, that the Commission wrongly concluded that there had been State aid.

On 28 January 2016, the General Court rendered its judgment. According to the General Court, the Commission did not err in law in finding that the benefit conferred on BayernLB constituted State aid and that it was compatible with the Restructuring Communication. The General Court therefore dismissed the action for annulment.

5.8 The case of Banco Privado Português (I)

Case T-487/11, Banco Privado Português SA and Massa Insolvente do Banco Privado Português v. Commission; case C-93/15, Banco Privado Português SA and Massa Insolvente do Banco Privado Português v. Commission

This case concerned the State aid to Banco Privado Português (BPP). The defining feature of this case is that Portugal *failed to submit a restructuring plan*.

On 5 December 2008, the Portuguese State decided to grant BPP a State guarantee. This State aid measure was authorised by the Commission for a period of six months on the basis of Article 87(3)(b) EC, on the assumption that the Portuguese authorities would implement their commitment to submit a restructuring plan within six months (i.e. by 5 June 2009). Portugal failed however to present a restructuring plan within this timeframe. As a result, the aid became unlawful since 6 June 2009. Moreover, since the restructuring plan was essential to the compatibility of the State aid measure[26], the failure to submit such a restructuring plan resulted in the aid measure being incompatible. In the decision on BPP of 20 July 2010 ("the BPP-decision"), the Commission ordered the Portuguese State to proceed with an immediate and effective recovery of the aid.

BPP and Massa Insolvente do Banco Privado Português[27] requested the Court to annul the BPP-decision. The applicants had raised several pleas in law. Two of them – the fourth and sixth plea in law – concerned the *order for recovery*. By the fourth plea in law, the applicants alleged infringement of Article 108(2) TFEU. By the sixth plea in law, the applicants essentially claimed that the principles of legal certainty and of the protection of legitimate expectations precluded the order for recovery of the aid in question, at the very least as regards

26. As the Commission explained in its Opening Decision (10 November 2009, para. 39), the commitment to submit a restructuring plan was especially important in the case of BPP, because the remuneration that BPP paid for the State aid was quite low.
27. Massa Insolvente do Banco Privado Português was the general body of creditors of BPP.

the recovery ordered for the period between 5 December 2008 and 5 June 2009, which was covered by the authorisation given in the decision of 13 March 2009.[28]

The seventh plea in law is worth mentioning. By this plea in law, the applicants alleged infringement of the right to ‘fair treatment’. The Court held that this plea in law must be construed as referring to the principle of equal treatment.[29] This will be discussed in more detail in section 5.20.3.

On 12 December 2014, the General Court rendered its judgment. The General Court concluded that the Commission had not committed any manifest errors of assessment or errors of law in the application of Article 107(3)(b) TFEU, in founding that, since no restructuring or liquidation plan had been submitted as of 5 June 2009, the State guarantee as well its extension beyond 5 June 2009 had to be declared incompatible with the internal market.[30] All the pleas in law were dismissed. Consequently, the General Court dismissed the action in its entirety.

The applicants brought an appeal against the judgment of the General Court. On 15 October 2015, the Court rendered its judgment,[31] by which it dismissed the appeal. It is noteworthy that in this judgment the Court referred many times to its judgment of 5 March 2015 in case C-667/13. This judgment will be discussed in the following section.

5.9 The case of Banco Privado Português (II)

Case C-667/13, Estado português v. Banco Privado Português SA and Massa Insolvente do Banco Privado Português SA

This case also concerned the State aid to Banco Privado Português (BPP). But unlike the judgment discussed in the previous section (which concerned a direct action), the judgment discussed in the present section was a *preliminary ruling*.[32]

28. Case T-487/11, para. 122.
29. Case T-487/11, para. 138.
30. Case T-487/11, para. 91.
31. An interesting feature of this judgment is the fact that it is only available in the French and Portuguese language (i.e. the working language and the language of the case). By contrast, in most bank state aid cases, the judgments are available in all the official languages of the European Union.
32. The case of BPP thus illustrates that the beneficiary bank can challenge the validity of the decision on two fronts: by means of an action for annulment and via a preliminary ruling. In their annotation, Pereira & Mucha (2015, p. 533-535) stressed this particular aspect of the case of BPP.

By the BPP-decision, the Portuguese State was ordered to recover the aid granted to BPP. The attempt by the Portuguese State to recover the aid from BPP led to proceedings before the *Tribunal do Comércio de Lisboa* (Lisbon Commercial Court) between the Portuguese State and BPP/Massa Insolvente do Banco Privado Português. Massa Insolvente do Banco Privado Português argued that the BPP-decision was unlawful and that Portugal's claim (resulting from the BPP-decision) had thus no legal basis. The *Tribunal do Comércio de Lisboa* had doubts as to the validity of the BPP-decision and therefore referred several questions to the Court of Justice for a preliminary ruling. On 5 March 2015, the Court rendered its judgment.

One of the questions raised by the *Tribunal do Comércio de Lisboa* was whether the BPP-decision was based on a contradictory statement of reasons since it stated on the one hand that the aid became unlawful as from 6 June 2009, while it stated on the other hand that the same aid had to be held to be incompatible with the internal market as from 5 December 2008. In that regard, the Court held that the fact that the BPP-decision mentions different dates from which the State aid must be regarded as unlawful, on the one hand, and incompatible with the internal market, on the other, does not disclose any contradiction in the statement of reasons underlying that decision.

Another noteworthy question related to the argument raised by BPP that the Commission had concluded that the guarantee was incompatible on the basis of non-compliance *on purely procedural grounds*, namely the fact that the Portuguese Republic did not submit a restructuring plan for BPP within the six-month period. This question concerns the relevance of submitting a restructuring plan and will be discussed in section 10.2.

The Court concluded that examination of the questions referred by the *Tribunal do Comércio de Lisboa* had disclosed nothing capable of affecting the validity of the BPP-decision.

5.10 The case of ARCO (I)

Case T-664/14, Belgium v. Commission; case T-711/14, Arcofin and Others v. Commission

Strictly speaking, the case of ARCO is not a *bank* State aid case, since ARCO is not a bank. Indeed, the ARCO Group consisted of three financial cooperative companies (ARCOPAR, ARCOPLUS and ARCOFIN). However, ARCO was one of the main shareholders of Dexia, a Belgian-French bank.[33] In the context of the recapitalisation of Dexia, the Belgian State decided to extend the Belgian Deposit Guarantee Scheme so that the individual shareholders in financial cooperatives would be protected against losses up to the limit of EUR 100.000 (hereafter: "the cooperative guarantee scheme").

The Commission was of the opinion that the cooperative guarantee scheme was tailor-made for ARCO, which had run into trouble because of its investments in Dexia. The Commission therefore considered that the guarantee conferred a selective advantage to the Belgian financial cooperative ARCO, the only beneficiary of the scheme.

In the decision on the cooperative guarantee scheme ("the ARCO-decision"), the Commission concluded that the Belgian cooperative guarantee scheme constituted State aid. In the context of the compatibility-assessment, the Commission held that financial cooperatives are not financial institutions. As a result, the guarantee scheme did not fall under the 2008 Banking Communication. The Commission therefore assessed the aid directly under Article 107(3)(b) TFEU. The Commission came to the conclusion that the guarantee could not be considered compatible with the internal market because it was neither appropriate nor necessary nor proportionate for the purposes of Article 107(3)(b) TFEU and it did not come within the scope of any other provision governing compatibility of State aid. Since the guarantee was incompatible, ARCO had received an undue advantage. By the ARCO-decision, the Commission ordered the recovery of the aid. In other words: ARCO had to pay back the undue advantage it received.

Both the Belgian State and Arcofin brought an action for annulment against the ARCO-decision. NB: this PhD-study was concluded on 1 August 2017. At that time, the Court had not yet rendered a judgment in this case.

5.11 The case of ARCO (II)

Case C-76/15, Paul Vervloet and Others

The case of ARCO also led to a preliminary ruling. Paul Vervloet and other investors felt disadvantaged because they did not qualify for the cooperative guarantee, since they had invested their money not in shares in ARCO but directly in shares in Dexia. For that reason, these investors considered that the

33. Dexia was a financial group with operational entities in Belgium, France and Luxembourg. The parent company, Dexia SA, was incorporated as a limited company under Belgian law and listed on the Euronext Paris and Euronext Brussels stock exchanges.

cooperative guarantee scheme infringed the principle of equality. They therefore instituted legal proceedings against the Belgian State. In the context of these proceedings, the *Grondwettelijk Hof* (Constitutional Court of the Kingdom of Belgium) requested a preliminary ruling.

On 21 December 2016, the Court rendered its judgment. In essence, the Court was asked to assess two aspects of the cooperative guarantee scheme. In the first place, the Court was requested to examine whether a guarantee scheme such as the Belgian one was compatible with the EU deposit-guarantee legislation laid down in Directive 94/19/EC ("the DGS Directive").

In line with the Opinion of Advocate-General Kokott of 2 June 2016, the Court concluded that the DGS Directive *does not oblige nor prevent* the Member States to include shares held by natural persons in recognised financial cooperatives in their respective national deposit-guarantee schemes.

In the second place, the Court was requested to assess the validity of the ARCO-decision. In the main proceedings before the Belgian court, ARCO was calling into question the validity of the ARCO-decision (by recourse to the same arguments as those on which it also based its action for the annulment of that decision before the General Court in case T-711/14).[34] Among others, ARCO argued that the cooperative guarantee scheme did not confer a selective advantage on the ARCO cooperatives. The Court, however, considered that there was no doubt that the ARCO Group benefited from the cooperative guarantee scheme. It was that guarantee scheme alone which protected the ARCO Group from the imminent flight of private investors in the ARCO Group. The Court concluded that the examination of the questions had disclosed no factor such as to affect the validity of the ARCO-decision.

5.12 The case of Banca Tercas

Case T-98/16, Italy v. Commission; case T-196/16, Banca Tercas v. Commission

This case concerned the contribution paid to Banca Tercas by the *Fondo Interbancario di Tutela dei Depositi* (FITD), the Italian deposit guarantee scheme. The contribution was provided in order to bring up the negative equity of Banca Tercas to 0 before the business was taken over by Banca Popolare di Bari (BPB).

34. The AG also explained the relation between the outcome of the preliminary ruling procedure and the action for annulment against the ARCO-decision: while the judgment of the Court in the preliminary ruling procedure would not have any formally binding effect on the General Court in pending Cases T-664/14 and T-711/14, it would certainly constitute "a not insignificant *de facto* precedent with regard to the outcome of those proceedings". Opinion in Case C-76/15, para. 107.

Italy considered that the intervention by the FITD did not constitute State aid, because the FITD's resources could not be considered as State resources, and the decision to use them was solely imputable to the FITD's members. The Commission, however, did not accept these arguments. In the Banca Tercas-decision, the Commission declared that the contribution paid to Banca Tercas by the FITD constituted State aid.

Furthermore, the Commission considered that the State aid was incompatible with the internal market. This conclusion was based on the following factors: i) the absence of a restructuring plan; ii) insufficient burden-sharing by the subordinated creditors; and iii) the lack of remuneration for the FITD intervention. Since the State aid was incompatible, the Commission ordered the recovery of the State aid.

Both the Italian State and Banca Tercas brought an action for annulment against the Banca Tercas-decision. NB: this PhD-study was concluded on 1 August 2017. At that time, the Court had not yet rendered a judgment in this case.

5.13 The case of the Slovenian banks

Case C-526/14, Kotnik and Others v. Državni zbor Republike Slovenije

This case concerned the burden-sharing measures that were taken by Slovenia in line with points 40 to 46 of the 2013 Banking Communication. These provisions of the Banking Communication require burden-sharing by shareholders and subordinated creditors.

On 17 December 2013, the Central Bank of Slovenia adopted a decision concerning extraordinary measures and ordered five Slovenian banks – Abanka, NLB, NKBM, Probanka and Factor Banka – to write off all eligible liabilities. These measures were contested before the *Ustavno sodišče* (i.e. the Constitutional Court of Slovenia). According to the *Ustavno sodišče*, while the objections of the applicants in the main proceedings were directed against provisions of the Slovenian law on the banking sector, their actual target was the 2013 Banking Communication. This was because the purpose of the Slovenian law on the banking sector was to establish a legal framework for burden-sharing in accordance with the requirements of the Banking Communication. The *Ustavno sodišče* therefore asked for a preliminary ruling. On 19 July 2016, the Court rendered its judgment.[35]

35. For a more detailed discussion of this judgment, see: Babis 2016; Vlahek & Damjan 2016.

One of the questions was whether the Banking Communication was binding on Member States. As explained in section 3.4.3, this question was answered in the negative by the Court.[36] Another question was whether points 40 to 46 of the 2013 Banking Communication – which require burden-sharing by shareholders and subordinated creditors – were compatible with Articles 107 TFEU, 108 TFEU and 109 TFEU. This question will be explained in more depth in chapter 12.

Another noteworthy question was whether points 40 to 46 of the 2013 Banking Communication were compatible with several provisions of Directive 2012/30 (a recast of the Second Company Law Directive). This Directive provides that any increase or reduction in the capital of a public limited liability company *must be subject to a decision by the general meeting of the company.*

The Court noted that Directive 2012/30 is intended to reassure investors that their rights will be respected by the governing bodies of the companies in which they have invested, particularly when a company is formed and when its share capital is increased and reduced. Consequently, the measures provided for by Directive 2012/30 in order to guarantee that protection *relate to the normal operation* of public limited liability companies. By contrast, the burden-sharing measures *constitute exceptional measures*. They can be adopted only in the context of there being a serious disturbance of the economy of a Member State and with the objective of preventing a systemic risk and ensuring the stability of the financial system. The Court concluded that Directive 2012/30 does not preclude measures relating to share capital being adopted, in certain specific circumstances, such as those mentioned in the 2013 Banking Communication, without the approval of the general meeting.[37]

36. On 18 February 2016, Advocate-General Wahl delivered his Opinion. As explained in section 3.4.3, the AG's opinion in this case contained some interesting considerations on the legal status of the Crisis Communications.
37. Case C-526/14, para. 89.

5.14 The case of Irish Life and Permanent (PTSB)

Case C-41/15, Dowling and Others v. Minister for Finance

This case concerned the State aid to Irish Life & Permanent (Permanent TSB or PTSB). Following PTSB's recapitalisation, a number of PTSB's former shareholders filed a lawsuit notably on the grounds that the capital injection was incompatible with the Second Company Law Directive.[38] The High Court of Ireland asked for a preliminary ruling.[39]

On 8 November 2016, the Court rendered its judgment.[40] In line with the judgment in case C-526/14 (Kotnik and Others), the Court considered that the rights conferred upon shareholders by the Second Company Law Directive do not preclude a Member State from urgently recapitalising an ailing bank in a situation where there is a serious disturbance of the economy and financial system of a Member State.

5.15 The case of Banco Espirito Santo (I)

Case T-812/14, BPC Lux 2 and Others v. Commission

The applicants in this case were subordinated creditors of Banco Espírito Santo (BES). BES was a Portuguese bank which in August 2014 was split-up into a Bridge Bank and a Bad Bank. All the sound business activities of BES were transferred to the Bridge Bank, while the shareholders and subordinated debt holders were left in the Bad Bank. The Bridge Bank was capitalised by the Portuguese resolution fund. In its decision of 3 August 2014, the Commission considered this State aid measure to be compatible with the internal market (the "BES-decision").

The applicants requested the Court to annul the BES-decision. The Commission contended that the action was inadmissible as the applicants did not have legal standing to bring proceedings for annulment of the BES-decision.

The General Court recalled that an action for annulment is admissible only in so far as that person has in interest in the annulment of the contested measure. In that regard, the General Court considered that that if the BES-decision were to be annulled, that would not have the effect of obliging the Portuguese Republic to reverse its decision to create a Bridge Bank and not

38. Directive 77/91/EEC.
39. When the Commission adopted its final decision, the action of PTSB's former shareholders was still pending before Irish courts. This did not prevent the Commission from adopting a final decision. See: IL&P (PTSB), 9 April 2015, para. 18.
40. On 22 June 2016, Advocate-General Wahl delivered his Opinion.

to include in the assets of that bank bonds of the kind held by the applicants. An annulment of the BES-decision would thus procure no advantage for the applicants. The action was therefore dismissed as inadmissible.

5.16 The case of Banco Espirito Santo (II)

Case T-814/14, Banco Espírito Santo v. Commission

This case concerned the Monitoring Trustee appointed in the case of Banco Espírito Santo (BES). Pursuant to point 9 and 18 of Annex II of the BES-decision, the Monitoring Trustee was to be remunerated by the Bad Bank. In the present case, Banco Espírito Santo (i.e. the Bad Bank resulting from the split-up of BES) sought the partial annulment of point 9 and 18 of Annex II of the BES-decision. The applicant argued that there was no basis (in the EU legislation concerning State aid) for imposing the responsibility for remunerating the Monitoring Trustee on the Bad Bank, which was not an addressee of the BES-decision nor a beneficiary of the aid.

On 1 December 2015, the General Court rendered its judgment. As regards the admissibility of the action for annulment, the General Court recalled that partial annulment of a Commission decision is possible only if the elements whose annulment is sought may be severed from the remainder of the decision. The General Court concluded that this was not the case. The appointment of a Monitoring Trustee was one of the commitments made by Portugal. In that regard, the General Court recalled that when the Commission adopts a decision not to raise objections, it does so by taking into account the commitments made by the Member State. The commitments thus form an integral part of the notified measure. Since the commitments are inextricably linked to the notified aid measure, the applicant cannot seek the annulment of only the commitments.[41] The action for partial annulment was therefore inadmissible.

5.17 The case of SNS REAAL

Case T-321/13, Adorisio and Others v. Commission

This case concerned the State aid to SNS REAAL in 2013. On 1 February 2013, SNS REAAL was nationalised by the Dutch State. In the context of the nationalisation, the shareholders and subordinated debt holders were expropriated.

41. It should be noted that, unlike Banco Espirito Santo, ABN AMRO was allowed to seek the annulment of one behavioural restriction. However, the decision on ABN AMRO was a conditional decision (in which the Commission imposed certain behavioural restrictions), while the decision on Banco Espirito Santo was a commitment-decision.

Until the nationalisation of SNS REAAL, Stefania Adorisio and the other 363 applicants held subordinated bonds issued by SNS REAAL. In the current case, they requested the Court to annul the decision of the Commission of 22 February 2013 ("the contested decision"). In the contested decision, the Commission concluded that the State aid to SNS REAAL was compatible with the internal market under Article 107(3)(b) TFEU.

The Commission argued that the action was inadmissible. The General Court accepted the argument of the Commission that the applicants did not have a legal interest in bringing proceedings. The Commission correctly argued that the applicants were unlikely to derive any benefit from the annulment of the contested decision. The annulment of the contested decision would not result in the Netherlands reversing its expropriation decision.[42] By order of 26 March 2014, the action was therefore dismissed as manifestly inadmissible.[43]

5.18 The case of MPS

Case T-313/13, Codacons v. Commission

Another case in which the action was dismissed as manifestly inadmissible is the case of MPS. In 2012, the Italian bank Monte dei Paschi di Siena (MPS) received State aid, which was approved by the Commission in the rescue decision of 17 December 2012. On 11 June 2013, *Coordinamento delle associazioni per la tutela dell'ambiente e dei diritti degli utenti e consumatori* (Codacons) had brought an action for annulment against the rescue decision of 17 December 2012. By order of 3 July 2013, the action was dismissed as manifestly inadmissible. The General Court recalled that there is a time-limit of two months for bringing an action for annulment. Since the action in this case was brought too late, the action was dismissed as manifestly inadmissible.

42. The General Court noted that an annulment of the expropriation could only be obtained before the competent national court ("Raad van State") and that the applicants indeed brought an action before the Raad van State. Case T-321/13, para. 27.
43. It should be noted that the General Court did not go into the substance of the case, since the General Court only decided on the pleas of inadmissibility.

5.19 Concluding observations on the case-law on bank State aid

The following table gives an overview of the cases discussed in the present chapter.[44]

Discussed in section	**Action for annulment**		**Reference for a preliminary ruling**	
	Who initiated proceedings?			
	Beneficiary bank or Member State	*Shareholders or other investors*	*Beneficiary bank or Member State*	*Shareholders or other investors*
5.2	ING and Netherlands *(in the case of ING)*			
5.3	FIH *(in the case of FIH)*			
5.4	ABN AMRO *(in the case of ABN AMRO)*			
5.5		Westfälisch-Lippischer Sparkassen- und Giroverband *(in the case of WestLB)*		
5.6		HSH Investment Holdings *(in the case of HSH Nordbank)*		
5.7	Austria *(in the case of BayernLB)*			
5.8	BPP *(in the case of BPP)*			
5.9			BPP *(in the case of BPP)*	
5.10	*Belgium and Arcofin *(in the case of ARCO)*			
5.11				Paul Vervloet and Others *(in the case of ARCO)*
5.12	*Italy *(in the case of Banco Tercas)*			
5.13				Kotnik and Others *(in the case of the Slovenian banks)*
5.14				Dowling and Others *(in the case of Irish Life and Permanent)*
5.15		BPC Lux 2 and Others *(in the case of BES)*		
5.16	BES *(in the case of BES)*			
5.17		Adorisio and Others *(in the case of SNS REAAL)*		
5.18		Codacons *(in the case of MPS)*		

44. Cases that were dismissed as inadmissible are shown in red. Cases in which the Court assessed the validity of the Commission decision are shown in green. Cases that were partially inadmissible are shown in orange. Cases in which the validity of the Commission decision was not questioned are shown in yellow. Cases that are still pending before the Court are marked by an asterisk.

In total, there are 17 cases (or 15, since the cases of ARCO and BPP were counted twice).[45] However, this total number of cases needs to be nuanced in three ways.

In the first place, only in 9 of these 17 cases, the legality (or validity) of the Commission decision was actually assessed by the CJEU. How to explain this difference? Firstly, of the 17 cases discussed, only 13 cases concerned direct actions; the other 4 cases concerned references for a preliminary ruling. A reference for a preliminary ruling can concern the interpretation or the validity. In two of the cases (i.e. BPP and Vervloet), the referring court asked questions about the validity of the Commission decision. The other two cases (i.e. Kotnik and Dowling) did concern State aid to banks, but they did not question the validity of a bank State aid decision. Secondly, some cases were dismissed as inadmissible (though for various reasons). As a consequence, the Court did not go into the substance of the case. This means that in those cases, the legality (or validity) of the Commission decision was not assessed.

In the second place, the contested decisions in the cases of BPP, ARCO and Banco Tercas were all recovery decisions. In that sense, these cases are 'atypical'. In the 'typical' bank State aid cases, Member States and banks are more reluctant to initiate legal proceedings.

In the third place, there are several cases – such as WestLB and HSH Nordbank – in which the action for annulment was not brought by the bank or Member State, but by the shareholders of the bank. Indeed, of the 13 direct actions, 8 were brought by the beneficiary bank or Member State.[46] The other 5 actions for annulment were brought by the shareholders or other investors of the bank.[47] It can also be observed that competing banks and other Member States are somewhat reluctant to challenge bank State aid decisions before the CJEU.

Thus, a prime observation is that most bank State aid decisions are not challenged before the Court of Justice.[48] In that regard, it is worth recalling that section 1.3.2 set out a distinction between three stages: *anticipating* the "treatment", *negotiating* the "treatment" and *challenging* the "treatment". From a quantitative point of view, the third stage is not that important. In total,

45. Counting the cases is not straightforward. The cases of ARCO and BPP are counted twice. The case of ING is counted as 1 case, even though the bank and the State initiated proceedings separately (cases T-29/10 and T-33/10).
46. ING, FIH, ABN AMRO, Austria (in BayernLB), BPP, Belgium (in ARCO), Italy (in Banco Tercas), BES.
47. WestLB, HSH Nordbank, ARCO, the Slovenian banks, SNS REAAL, MPS.
48. In his annotation on the ING-case, Rivas (2014, p. 723) remarked that the Crisis Framework has been largely untested before the Court of Justice.

there are almost 100 bank State aid cases. Only in 9 cases, the CJEU actually reviewed the legality of the Commission decision. So in most bank State aid cases, the second stage is the final stage.

5.20 The principle of equal treatment in the case-law on bank State aid

In the cases of ABN AMRO, WestLB and BPP (discussed in sections 5.4, 5.5 and 5.8 respectively), it was claimed that there was an infringement of the principle of equal treatment. Given the relevance of the principle of equal treatment to this PhD-study, these pleas in law will be discussed in detail in the present section.

5.20.1 The case of ABN AMRO

ABN AMRO claimed that the Commission infringed the principle of equal treatment by imposing an acquisition ban which was significantly more strict than in other decisions.[49] The acquisition ban entailed that ABN AMRO would not acquire control of more than 5% of any undertaking. This acquisition ban includes two relevant aspects. Firstly, it concerns 'any undertaking'. Secondly, it concerns acquisition 'of more than 5%'. As regards the first aspect, ABN AMRO argued that the vast majority of Commission decisions adopted at the same time only prohibited the acquisition of *financial institutions* or *competing businesses*. As regards the second aspect, ABN AMRO argued that most of the relevant decisions, including the Lloyds, ING, RBS and LBBW decisions, prohibited *only the full acquisition* of companies or the acquisition of control of them.

The General Court first recalled that the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. The General Court then considered that it is very difficult to establish whether bank State aid decisions are comparable or not.[50] In that regard, the General Court recalled that bank State aid can be approved only if the essential conditions laid down in the Restructuring Communication are satisfied, which requires an overall analysis of the Commission's decisions, based on a restructuring plan and on appropriate commitments and conditions. As a result, a comparison of the individual measures imposed in different decisions is particularly dangerous.[51]

49. Case T-319/11, para. 102.
50. Case T-319/11, para. 112.
51. Case T-319/11, para. 113.

In any event, in so far as the Court was able to undertake a comparative examination of conditions imposed in different decisions, the burden of proof that the situations at issue are comparable, would fall on the applicant (in this case: ABN AMRO).[52]

In support of its plea, ABN AMRO referred to the decisions on Commerzbank, LBG, KBC, ING, RBS, LBBW, Dexia and Sparkasse KolnBonn. The General Court noted that, even though those banks were in the same business sector as ABN AMRO, they all displayed particular characteristics and operated in a specific environment. The General Court held that "with regard to those banks, a restructuring plan was submitted to the Commission, the characteristics of which have not been established to be the same as that of ABN AMRO, together with specific commitments, *circumstances which call into question the comparability of the situations at issue*".[53]

In addition, the General Court observed that the scope of the prohibitions as it was accepted in respect of those other banks was not always as limited as is claimed by ABN AMRO. Admittedly, in several decisions, the prohibition was limited to the acquisition of shareholdings in companies active in the same sector. However, there are also decisions in which the acquisition ban extended to undertakings outside the financial sector. The General Court concluded that these decisions called into question ABN AMRO's argument that an equally strict prohibition was not imposed on any other bank.[54]

In essence, the General Court concluded that ABN AMRO had failed to establish that the other cases were comparable. ABN AMRO also failed to establish that the acquisition ban in the case of ABN AMRO was more strict than the acquisition ban in other cases. The plea in law was therefore rejected.[55]

5.20.2 The case of WestLB

The applicant in this case claimed that the WestLB-decision infringed the principle of equal treatment. According to the applicant, making the authorisation of aid to a bank subject to the obligation to sell the bank was unprecedented in the Commission's decision-making practice. The applicant argued that a comparison of the WestLB-decision with the decision on Commerzbank would clearly show that there had been unequal treatment, because in the Commerzbank-decision (which was adopted a week before the WestLB-decision), the

52. Case T-319/11, para. 114.
53. Case T-319/11, para. 116.
54. Case T-319/11, para. 121.
55. The plea in law alleging infringement of the principle of equal treatment with regard to the *duration* of the acquisition ban was also rejected. Case T-319/11, para. 190.

Commission did not require a change in the ownership structure of the beneficiary bank. In addition, the applicant produced a table which, in its view, showed that the WestLB-decision was the only decision in which authorisation of the aid at issue was made subject to a change in the beneficiary's ownership structure.[56]

The General Court recalled the CJEU-definition of the principle of equal treatment and held that the applicant had not demonstrated that WestLB was in a situation comparable to that of the other beneficiary banks.[57] In that regard, the General Court held that the effect of restructuring aid granted to a bank in difficulty in a situation of financial crisis fundamentally depended on a set of individual circumstances, which include the bank's economic situation and its prospects of being restored to economic viability. However, the applicant did not examine whether the Commission, in the decisions relating to the banks which it cited (such as Commerzbank), had considered that the ownership structures were as problematic as that of WestLB.[58]

In addition, the General Court noted that it is only in the context of Article 87 (3)(b) EC[59] that it is necessary to assess the legality of a Commission decision declaring that new aid does not fulfil the requirements for application of that derogation, and *not in the light of its previous decision-making practice*, assuming that the latter is established. This was clarified as follows: "The concept of State aid and the conditions necessary for ensuring the restoration of the beneficiary's viability reflect an objective situation which must be appraised on the date on which the Commission takes its decision. Thus, the Commission's reasons for having made a different appraisal of the situation in an earlier decision must remain immaterial to the appraisal of the lawfulness of the contested decision."[60]

Furthermore, the General Court considered that the Commission cannot be deprived of the opportunity to set compatibility conditions stricter than those in previous decisions if so required by the development of the common market and the objective of undistorted competition within that market.[61]

56. Case T-457/09, para. 360-361.
57. Case T-457/09, para. 365.
58. Case T-457/09, para. 366.
59. Article 87(3)(b) EC corresponds to Article 107(3)(b) TFEU.
60. Case T-457/09, para. 368. See also: Judgment of the ECJ of 30 September 2003 in joined Cases C-57/00 P and C-61/00 P, para. 52-53.
61. Case T-457/09, para. 369.

The General Court also pointed at the fact that it is the Member State who proposes commitments and that the Commission only considers whether these commitments are adequate (in order to ensure viability, burden-sharing and limiting competition distortions). As a consequence, differences between the restructuring plans are due to a choice by the Member State concerned, rather than being due to a choice by the Commission. For that reason, the General Court held that "in principle, the fact that authorisation of restructuring aid is made subject to compliance with the measures provided for by the restructuring plan to which the Member State concerned has committed itself *cannot result in an infringement of the principle of equal treatment*".[62]

On the basis of these considerations, the General Court concluded that the applicant had failed to demonstrate that the Commission discriminated against the applicant. The plea in law (alleging infringement of the principle of equal treatment) was therefore rejected.

5.20.3 The case of Banco Privado Portugues (BPP)

By the seventh plea in law, the applicant (in case T-487/11) alleged infringement of the right to 'fair treatment'. In support of this plea in law, the applicant referred to several other bank State aid decisions. In particular, the applicant argued that in the decision on Banco Português de Negócios (BPN), the Commission was more 'tolerant' than in the case of BPP, even though BPN and BPP were in a comparable situation. The applicant raised three arguments to support its view that BPN and BPP were in a comparable situation: first, the two State aid measures in question had been notified at almost the same time; second, in BPN's case, the Portuguese authorities had also been slow to submit a restructuring plan; third, the State aid measures in the case of BPN were much more significant from a financial point of view.

In its judgment of 12 December 2014, the General Court held that this plea in law (alleging infringement of the right to 'fair treatment') should be interpreted as referring to the principle of equal treatment.[63] The General Court recalled the CJEU-definition of the principle of equal treatment and considered that the applicant had not demonstrated, to the requisite legal standard, that BPN and BPP were in a comparable situation. In particular, the General Court held that BPN eventually did present a restructuring plan, whereas BPP failed to do so. This was an essential difference between the two cases.

62. Case T-457/09, para. 370-371.
63. Case T-487/11, para. 138.

In addition, the General Court considered that the mere notification at more or less the same time of the aid measures planned by the Portuguese authorities to assist these two banks was not decisive. Furthermore, in BPN's case, the Commission initiated the formal examination procedure not because there was no restructuring plan at all, but because the initial restructuring plan submitted had become obsolete owing to the sale of BPN and the Commission had to assess a revised plan at a later stage.

The General Court concluded that the key differences in the respective situations of BPN and BPP warranted the finding that the situations were not comparable and that, therefore, the principle of equal treatment as relied on by the applicant could not apply in the present case. The plea in law was therefore rejected.[64]

5.20.4 Reflection

The discussion of the cases of ABN AMRO, WestLB and BPP has shown that none of the applicants could successfully claim that the Commission had violated the principle of equal treatment. In each of the three cases, the plea in law alleging an infringement of the principle of equal treatment was rejected by the Court. This is illustrative of the fact that the Court almost never finds that the principle of equal treatment is infringed. This is due to three complicating factors.

In the first place, it should be recalled that the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified. Thus, in order to be able to apply the principle of equal treatment, one must be able to establish whether situations are comparable or not. However, as is illustrated by the cases of ABN AMRO, WestLB and BPP, *it is very difficult to establish whether beneficiary banks are in a comparable situation*. Indeed, banks are different, State aid measures are different and restructuring plans are different. Hence, there are always circumstances that "call into question the comparability of the situations at issue".[65]

64. Case T-487/11, para. 141. NB: in appeal (Case C-93/15), the judgment of the General Court was upheld by the ECJ.
65. As the General Court considered in Case T-319/11 (ABN AMRO), para. 116.

In the second place, there is a more fundamental problem. It is established case-law that it is only in the context of Article 107(3)(b) TFEU that it is necessary to assess the legality of a Commission decision, and *not in the light of its previous decision-making practice*.[66] This essentially means that beneficiary banks and Member States cannot refer to other decisions to support their argument that in the contested decision, the Commission departed from its earlier decision-making practice.[67]

In the third place, it should be recalled that there are commitment decisions and conditional decisions.[68] The restructuring measures are sometimes depicted as being imposed by the Commission. This may be true *de facto*, but from a strictly legal perspective, the restructuring measures are proposed by the Member State concerned. Only if the Commission adopts a *conditional decision*, the restructuring measures are imposed by the Commission. If, on the contrary, the Commission adopts a *commitment decision*, the restructuring measures are commitments by the Member State. As the Court held in the case of WestLB, "in principle, the fact that authorisation of restructuring aid is made subject to compliance with the measures provided for by the restructuring plan to which the Member State concerned has committed itself *cannot result in an infringement of the principle of equal treatment*".[69]

For these reasons, I am of the opinion that the principle of equal treatment is interpreted very narrowly by the Court of Justice.

5.21 Concluding remarks

As set out in section 5.1.2, this chapter had a twofold purpose: to give an overview of the case-law of the CJEU on bank State aid and to discuss how the CJEU has interpreted the principle of equal treatment in bank State aid cases. The main findings of this chapter can be summarised as follows. In the first place, most bank State aid decisions are not challenged before the Court of Justice (see section 5.19). In the second place, the principle of equal treatment is interpreted very narrowly by the Court of Justice (see section 5.20). This PhD-study takes into account both findings. The narrow CJEU-definition of

66. Case T-171/02 (Regione autonoma della Sardegna v Commission), para. 177; Joined Cases C-57/00 P and C-61/00 P (Freistaat Sachsen and Others v Commission), para. 52 and 53.
67. The principle that the Commission can depart from its previous decision-making practice is somewhat alleviated by the fact that the Commission cannot depart from its guidelines and communications, and that these guidelines and communications are sometimes codifications of the Commission's decisional practice.
68. The distinction between commitment decisions and conditional decisions was explained in section 3.7.3.
69. Case T-457/09, para. 370-371.

the principle of equal treatment might be considered problematic. However, since only a small fraction of the bank State aid cases are assessed by the CJEU, the fact that the CJEU interprets the principle of equal treatment in such a narrow way, is less problematic. This justifies looking at other – possibly broader – definitions of the principle of equal treatment. This will be done in the next chapter.

Chapter 6. Applying the principle of equal treatment to bank State aid cases

6.1 Introduction

While the previous four chapters provided some indispensable backgrounds to the topic of this PhD-study, the present chapter is essentially a continuation of chapter 1. Indeed, chapter 1 set out the main aim of this PhD-study: to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. A fundamental question in that regard is *how the principle of equal treatment can be applied to bank State aid cases*. The current chapter focusses on this fundamental question.

To that end, section 6.2 provides a brief overview of the principle of equal treatment. Section 6.3 outlines that there are differences in the restructuring plans. From that perspective, banks are treated differently. Does this different treatment constitute a violation of the principle of equal treatment? In my view, there are three possible approaches to finding out whether the different treatment constitutes an unequal treatment. However, two of these approaches are problematic, as is explained in sections 6.4, 6.5 and 6.6. The core of the present chapter can be found in section 6.7 which introduces the 'relevant characteristics approach' – this is the approach that I will take in this PhD-study to find out whether the bank State aid decisions are in line with the principle of equal treatment. Section 6.8 introduces a concept that plays a central role in the 'relevant characteristics approach': the relevant context. Building upon the 'relevant characteristics approach', section 6.9 addresses some further issues and thereby provides the basic outline of the remainder of this PhD-study.

6.2 The principle of equal treatment

The previous chapter introduced the CJEU-definition of the principle of equal treatment. It should be stressed that the CJEU-definition is only one of the many manifestations of the principle of equal treatment.

In that regard, the principle of equal treatment has been aptly called "a scattered principle found in different locations and in different forms".[1] This is manifested in the variations in legal status, function, scope and wording of the principle of equal treatment. The principle of equal treatment started as a moral notion which became a general principle of law: the many Treaties and Constitutions in which the principle of equal treatment is codified, illustrate this. The principle of equal treatment exists both within and outside the EU. In the EU-context, the principle of equal treatment can be found in the Treaties and in the Charter.[2] In addition, it was developed in the case-law of the CJEU.

Besides these different locations, there are different forms of the principle of equal treatment. Firstly, the principle of equal treatment is sometimes expressed in the form of a prohibition of discrimination.[3] In those instances, the principle of equal treatment is related to the idea that all people are equal and should be treated as equals. Secondly, the addressees of the different manifestations of the principle of equal treatment vary: sometimes, it is aimed specifically at the legislator and the administrative bodies; sometimes, it also applies to horizontal relations.

This PhD-study focusses on the principle of equal treatment in the context of State aid to banks. Consequently, the principle of equal treatment will only be discussed to the extent that it is relevant in that specific context.[4] This PhD-study is interested in the principle of equal treatment as a guiding principle for the Commission to ensure a sound/proper/good administration.[5] In this function, the principle of equal treatment serves as a standard of review. From this perspective, there are essentially two definitions of the principle of equal treatment: the definition given by the CJEU and the Aristotelian formula.

1. Bell 2004, p. 244.
2. The Charter of fundamental rights contains some important provisions on equality. Article 20 provides that everyone is equal before the law. Article 21 provides that "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".
3. The non-discrimination principle is a specific form of the principle of equal treatment.
4. The aim of this PhD-study is not to demonstrate that the principle of equal treatment is fundamental. Entire books have been written about the principle of equal treatment. For more information on the principle of equal treatment, see: J.H. Gerards, Rechterlijke toetsing aan het gelijkheidsbeginsel. Een rechtsvergelijkend onderzoek naar een algemeen toetsingsmodel, Dissertation 2002.
5. In Dutch administrative law, the term "algemene beginselen van behoorlijk bestuur (a.b.b.b.)" is used to describe the principles that ensure a good administration. However, this PhD-study will not use the term "principle of good administration", because in EU-law, this term is reserved for a specific principle.

The CJEU-definition of the principle of equal treatment

As explained and illustrated in the previous chapter, the Court of Justice of the European Union (CJEU) can be called upon to review the legality of administrative decision-making by the Commission. This judicial review entails that the CJEU has to check whether the decisions are in accordance with the applicable rules and legislation, and whether they are in accordance with the general principles of EU law. Since the principle of equal treatment is one of the general principles of EU law, this principle thus functions as a standard of review. In this specific function, the principle of equal treatment was primarily developed in the case-law of the CJEU. According to settled case-law, the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.[6]

The Aristotelian formula

The Aristotelian formula requires that "like cases must be treated alike, and unlike cases unalike, proportionate to the differences between them". This formula resembles the definition of the CJEU. The striking difference between the CJEU-definition and the Aristotelian formula can be found in the last part of the Aristotelian formula: the notion that "unlike cases should be treated unalike, proportionate to the differences between them" is not reflected in the CJEU-definition.

6.3 Which definition should be used in this PhD-study?

6.3.1 A different definition

As set out in the previous section, there are two main definitions of the principle of equal treatment. Nevertheless, in this PhD-study, I do not use the CJEU-definition nor the Aristotelian formula. Instead, I propose a different definition[7]; see section 6.7.

6. See case T-319/11, para. 110 and case-law cited. T-487/11, para. 139. The Court refers to case C-127/07 (para. 23, 25 and 26) and case C-176/09 (para. 31 and 32). It is sometimes elaborated as follows: "The comparability of different situations must be assessed with regard to all the elements which characterize them. These elements must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account."
7. As regards terminology: with the term 'definition', I do not only mean the way how the principle of equal treatment is *defined*, but also the way how it is *interpreted* and *applied*.

Why do I propose a different definition? This is due to the following three reasons. In the first place, I am of the opinion that the CJEU-definition is unsatisfactory for the purposes of this PhD-study (see subsections 6.3.2 and 6.3.3). In the second place, I am of the opinion that I am not bound to use the CJEU-definition. In my view, it is justified to use other definitions of the principle of equal treatment (see subsection 6.3.4). One of these other definitions is the aforementioned Aristotelian formula. However, I am of the opinion that the Aristotelian formula is unfeasible in the specific context of bank State aid cases (see subsection 6.3.5).

6.3.2 When is a definition satisfactory?

In my opinion, a definition of the principle of equal treatment is satisfactory when it can remedy the lack of clarity that was established in section 1.2. This lack of clarity concerns the fact that there are many differences among the cases and many differences among the treatments.[8]

As regards the *differences among the treatments*, it should be recalled that the restructuring measures are different for each beneficiary bank. Some banks have to divest a substantial part of their activities, while other banks do not have to divest so much. Also the behavioural commitments may differ. All these differences mean that there is a different treatment. However, a different treatment does not necessarily mean that the principle of equal treatment is violated. A different treatment is justified if the cases are different.

As regards the *differences among the cases*, it was described in chapter 3 that there is a wide variety of State aid measures. These measures can differ in several ways. First of all, some measures are part of a general rescue scheme, while other aid measures are adopted on an ad-hoc basis. Secondly, some measures (such as impaired asset measures) are targeted at the asset-side of the balance sheet, whereas other measures (such as recapitalisations and guarantees) are targeted at the liability-side of the balance sheet. Thirdly, the size and modalities of the aid measures are different. Fourthly, sometimes banks benefit from solely one aid measure, but sometimes a combination of different measures is taken for a particular bank. Moreover, not only aid measures are different; banks themselves are also different. Banks can differ in size, scope, business model, activities, funding, etc. All those characteristics make banks different from each other.

8. As a preliminary note: the "cases" are constituted by the banks that benefit from State aid measures, the "treatment" is constituted by the restructuring measures that are required from beneficiary banks.

It is thus abundantly clear that bank State aid cases are different. Because of all those differences, the situations of beneficiary banks are not the same. In Aristotelian terms, the cases are not alike. Consequently, the cases should not be treated alike. This makes it quite evident that the treatment should not be the same. But do the differences between the State aid cases *justify* the differences in treatment?

This question is not easy to answer. In that regard, there is a lack of clarity. The purpose of this PhD-study is to provide clarity. As a corollary, the definition (of the principle of equal treatment) employed in this PhD-study should be capable of providing clarity. Otherwise, the definition would not be satisfactory for the purposes of this PhD-study.

6.3.3 Why is the CJEU-definition unsatisfactory?

In my opinion, the CJEU-definition is unsatisfactory, because it does not provide a way of establishing whether the differences between the bank State aid cases justify the differences in treatment. The CJEU has held that "comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified". However, since there are always circumstances that "call into question the comparability of the situations at issue"[9], the CJEU-definition is in my view very narrow. This is underlined by the three cases discussed in section 5.20. For instance, in its judgment on ABN AMRO, the CJEU held that it is difficult to establish that situations are actually comparable when dealing with bank State aid decisions.[10] This illustrates my point: since bank State aid cases are evidently different, the different treatment of those cases is completely in line with the principle of equal treatment, as defined by the CJEU.

For this reason, I am of the opinion that the principle of equal treatment is *interpreted very narrowly* by the CJEU. And because the CJEU-definition is so narrow, it cannot remedy the lack of clarity. Indeed, it cannot provide a way of establishing whether the differences between the bank State aid cases justify the differences in treatment. For this reason, I am of the opinion that the CJEU-definition is *unsatisfactory* for the purposes of this PhD-study.

9. As the General Court considered in case T-319/11 (ABN AMRO), para. 116.
10. T-319/11, para. 184. It should be noted that the comparison in the case of ABN AMRO was about a specific restructuring measure (i.e. the acquisition ban) rather than the total package of restructuring measures. The Court held that a comparison of a specific restructuring measure is of little relevance, since the Commission undertakes an overall analysis on a case-by-case basis.

6.3.4 *Why is it justified to use other definitions of the principle of equal treatment?*

It could be argued that the Commission, as an EU-Institution, is only bound by the CJEU-definition of the principle of equal treatment. However, in my opinion, the Commission should not only be concerned by the CJEU-definition of the principle of equal treatment, but also by other possible interpretations of the principle of equal treatment.

It is not inconceivable that a Commission decision does not infringe the principle of equal treatment as defined by the CJEU, but that it does infringe the principle of equal treatment as defined by the Aristotelian formula. In such a case, the decision cannot be successfully challenged before the CJEU. However, it is worth recalling that section 1.3.2 set out a distinction between three stages: 1) *anticipating* the "treatment", 2) *negotiating* the "treatment" and 3) *challenging* the "treatment". In the second stage, more and different arguments may be used than only the arguments that the CJEU would accept. Although the third stage might cast a shadow to the second stage, the parties in the second stage (i.e. the Commission, the Member State and the beneficiary bank) are not bound by the CJEU-interpretation of the principle of equal treatment. Thus, even though the argument that a Commission decision infringes the Aristotelian principle of equal treatment cannot be used to challenge this decision before the CJEU, it can still be used as an argument in the negotiations with the Commission. In that regard, it is worth recalling that the second stage may even be more important than the third stage. Especially from a quantitative perspective, the second stage is more important than the third stage. Indeed, one of the main conclusions of chapter 5 was that for most beneficiary banks, the second stage is the final stage.

6.3.5 *Why is the Aristotelian formula unfeasible?*

At first glance, the Aristotelian formula offers a better way (than the CJEU-definition) of addressing the question whether the differences between the bank State aid cases justify the differences in treatment. Indeed, the Aristotelian principle requires not only that unlike cases are treated unalike; they should be treated unalike, *proportionate to the differences between them*. From this perspective, it is not enough to simply establish *that* cases are different, it should also be established *how* different the cases are. The treatment should be correspondingly different. So this raises the question as to the comparability of the cases and the comparability of the treatments.

The comparability (or the degree to which cases are different) is a rather vague concept if it is not defined *in what respect* the cases are different. In my opinion, there are essentially two approaches. State aid cases are characterised by many different characteristics. One can either compare the cases on the basis of all those different characteristics, or one can combine all those characteristics into one single metric[11] and compare the cases on the basis of this metric. So there are two approaches, which I have labelled in this PhD-study as the 'one-metric approach' and the 'many-variables approach'. However, both approaches are problematic. This will be explained in sections 6.4 and 6.5.

6.4 The 'one-metric approach'

6.4.1 Introduction

The previous section explained that there are many differences among the cases. These differences warrant a different treatment, but how different should different cases be treated? The "one-metric approach" attempts to find an answer to this question.

The first step of this approach would be the following. Bank State aid decisions can contain a wide array of commitments and conditions with all different modalities. Would it be possible to use a single metric to capture all of these restructuring measures? If all the different restructuring measures can be captured into one single metric, then it becomes possible to compare the treatments in terms of that metric. What metric should be used? In other words: the treatments are to be compared *in terms of what*? One could choose a metric such as the severity (or harshness) of the restructuring measures. Since restructuring measures are often seen as "punishment", it would make sense to look how severe the treatment is. The treatments can then be compared on the basis of their severity.[12]

The next step would be to do the same for the "cases". State aid cases have many characteristics. The characteristics of the "case" are constituted by a combination of the characteristics of the bank and the characteristics of the State aid measure. In order to compare the cases, these characteristics of the cases should be combined into a single metric. One could choose for a metric such as the amount of 'harm' that the State aid has caused. If the amount of harm can

11. I use the term "metric" and not "measure", because the term "measure" may cause confusion with other terms such as "State aid measures" and "compensatory/restructuring measures". The Dutch language has an advantage here, because there the terms "maatstaf" and "maatregel" exist.
12. The following considerations of the General Court in case T-319/11 support the approach to compare the treatments in terms of the degree of severity: "Further, as contended by the Commission, all those banks were compelled to undergo balance sheet reductions and also, for the most part, to divest themselves of certain businesses, a fact which may clearly have an effect *on the degree of severity* of the behavioural measures accepted, which may again call into question their comparability with this case."

be established, then the cases can be compared on the basis of this metric. In other words: it comes down to determining how different the cases are in terms of harm that they caused.

The final step would be to find out if the degree to which the cases differ from each other (in terms of the metric) can be related to the degree to which the treatments of those cases are different. The underlying idea is that the gravity of the case is related to the severity of the treatment. This follows from the principle of proportionality, which requires that the treatment is proportionate. In other words: banks where many things are wrong, deserve a harsher punishment (i.e. far-reaching restructuring measures).[13]

This line of reasoning can be illustrated by the following example. Assume that there are two cases (A and B) and that both the gravity of each case and the severity of the treatment can be quantified. The gravity of case A is 1 and the gravity of case B is 2. The severity of treatment A is 3 and the severity of treatment B is 6. See the following table.

	A	B
gravity of the case	1	2
severity of the treatment	3	6

There are two types of relations:
– The relation between (the gravity of) the case and (the severity of) the treatment, so the relations 1:3 and 2:6. This is the *proportionality.*
– The relation between the cases, so the relations 1:2 and 3:6. This is the *comparability (the degree to which cases are different)*.

The principle of proportionality only concerns the relations [1:3] and [2:6]. The principle of equality concerns the way how these relations relate to each other, so [1:3]=[2:6] or [1:2]=[3:6]. The principle of equality works in two ways, which lead to the same outcome. It requires that the proportionality is the same for each case. So if treatment A is three times higher than the gravity of case A, then treatment B should also be three times higher than the gravity of case B. In numerical terms, [1:3]=[2:6]. Another way of putting it, is that the principle of equality requires that the degree to which cases A and B differ, should be reflected in the treatments. So if the gravity of case B is two times higher than the gravity of case A, then the severity of treatment B should also be two times higher than the severity of treatment A. In numerical terms, [1:2]=[3:6].

13. The Commission expressed this in the following terms: "As a general rule, the more significant the reliance on State aid, the stronger the indication of a need to undergo in-depth restructuring." (point 15 of the First Prolongation Communication).

This example clearly illustrates that the one-metric approach can only work if the gravity of the case and the severity of the treatment *can be quantified*. Cases can only be compared in terms of a metric if a certain value can be assigned to that metric. Since this is not the case, the one-metric approach will not work in practice. In the following two subsections, this will be explained in more detail.

6.4.2 Determining the comparability of the cases

In the previous subsection, the metric 'harm' or 'harmfulness' was mentioned as an example. However, is this really a good metric? Can State aid cases be compared in terms of the harm that the State aid has caused? Intuitively, such a metric would make sense. State aid is harmful. That is the whole reason why the EU has set up State aid control. The purpose of State aid control is to contain the harmful effects of State aid, either by prohibiting the State aid measures or by requesting restructuring measures. This means that comparing State aid measures in terms of their harmfulness may be meaningful.

On a conceptual level, the harmfulness may thus be a good metric. On a practical level, however, it is somewhat problematic. This is due to the fact that there are different kinds of harm caused by State aid: the distortion of the level playing, moral hazard, the risk of a subsidy race between Member States, the fact that State aid may allow an inefficient firm to stay on the market.[14] Some of those harmful effects may be hard to quantify. This makes it even more difficult to add up these harmful effects. In other words: the 'total amount' of harm cannot be determined.[15] If the total amount of harm cannot be established, then it cannot be established how different the cases are with respect to their harmfulness.

6.4.3 Determining the comparability of the treatment

While in popular conception, the restructuring plan might be perceived as punishment, the treatment serves more objectives than only punishing banks. For instance, the restructuring measures are also taken to ensure that the bank will become viable in the long run. In chapter 3, it was explained that the Restructuring Communication is based on three basic principles: i) restoration of long-term viability of the bank, ii) burden sharing, and iii) minimization of

14. In that respect, Lo Schiavo (2013, p. 152) speaks of a "multifaceted theory of harm".
15. For the specific types of harm, one could try to find some relation between the harm and the severity of the compensatory measures. For instance, if the State aid has caused large distortions of competitions, one would expect more and more severe compensatory measures. If the State aid has caused a large moral hazard problem, one would expect more burden sharing measures. However, some compensatory measures may be aimed at both problems (of competition distortions and moral hazard). It is very hard to establish a one-to-one relation between a problem and a solution, if the solution is aimed at more problems.

competition distortion. This means that the "treatment" serves three purposes. While some restructuring measures may be aimed specifically at one of those three purposes, this is not always the case. For instance, a divestment may be needed to restore the long-term viability of a bank. At the same time, it is an own contribution of the bank.[16]

It would therefore be wrong to assume that the treatment is only about punishing the banks that received State aid. This does not, however, mean that treatments cannot be compared in terms of their punitive effect. It could be argued that, while not having the *purpose* of punishing a bank, a compensatory measure may have the *effect* of punishing a bank. Consequently, treatments can be compared in terms of their punitive effect.

Even if punitive effect (or severity) is used as a metric, there are problems with the actual application of this metric. One of the most severe restructuring measures is the divestment. Assume that Bank A has to divest 5% of its assets and that Bank B has to divest 20%. At first sight, it seems that Bank B is 'punished' more than Bank A. However, only looking at the percentages is deceiving. The picture (that Bank B is punished more) may change if the example is extended: assume that Bank A has to divest 5% within one year and that Bank B has to divest 20% within three years. The timeframe can be a very relevant aspect. It may be much harder to divest a small stake of 5% within one year than it is to divest a larger stake within three years. This makes it hard to determine which bank is punished more (i.e. which structural remedy is more severe).

The severity of the divestment is also influenced by the prevailing market conditions. In good times, it may be easier to find potential acquirers than in bad times.[17] In addition, if the market knows that the bank is forced to divest a certain subsidiary, then the bank finds itself in a difficult bargaining position.

16. This is corroborated by the General Court in its judgment in T-319/11 (para. 118): "Admittedly, as argued by ABN Amro, some of the structural measures imposed on those other banks were imposed in the interests of ensuring the viability of the bank. Nonetheless, it is obvious that, at least in some cases, the divestments were also imposed in the interests of offsetting or limiting distortions of competition. In that regard, as stated by the Commission, the Commerzbank, Lloyds, KBC, ING, RBS, LBBW, Dexia, Sparkasse Köln/Bonn and Aegon decisions are examples of decisions in which, unlike the ABN Amro decision, structural measures were imposed, with the aim of, inter alia, limiting the risks of distortion of competition."
17. Since the probability that market conditions will change over the course of 3 years is larger than the probability that market conditions will change over the course of only one year, a longer divestment timeframe would enable the bank to wait for a favourable moment to divest.

The severity of the divestment is also determined by the modalities of the divestment. A divestment of 20% can be achieved by selling one subsidiary of 20% or by selling 10 different activities of each 2%.[18] This also influences the severity of the treatment.

Consider the following example. Bank X has to divest a subsidiary; this subsidiary is structurally loss-making. The commitment to divest a loss-making subsidiary is not really a punishment.

That a divestment is not always bad, is also illustrated by the fact that some banks voluntarily divest subsidiaries. For instance, Barclays chose to divest its global investment banking business.[19] Mamdani argued that "although the measures required to ensure a return to long-term viability may have appeared very radical, however, it should be borne in mind that the restructuring undertaken by aided banks was not dissimilar to the sort of restructuring that their unaided competitors were doing of their own accord".[20] However, it should be borne in mind that a voluntary divestment is different from a forced divestment, because the bargaining position of the bank vis-à-vis potential acquirers would probably be better in the case of a voluntary divestment.

The aforementioned examples make clear that it is difficult to compare structural remedies in the form of divestments. A percentage alone is not enough to determine the severity of a divestment. The severity depends not only on the size of a divestment, but also on its timeframe, the modalities of the divestment and the nature of the divested subsidiaries (profit-generating or loss-making).[21]

6.4.4 Relation between aid intensity and balance sheet reduction

In some studies, an attempt is made to compare State aid cases. For instance, Laprévote & Paron have examined the relation between the aid intensity and the balance sheet reduction.[22] The aid intensity is measured by the aid amount divided by the risk-weighted assets (RWA) of the bank. Laprévote & Paron plotted the balance sheet reduction (expressed as a percentage) as compared to the aid amount/RWA-ratio. They found a positive relation between these two parameters – although there were a number of outliers – and concluded that

18. This is of course a stylized example, but the cases of ING and KBC show that such different modalities also arise in reality. KBC had to divest a large number of small subsidiaries and branches, whereas ING had to divest a small number of large subsidiaries and branches. This difference was also observed in the media: see, for instance, FD of 3 June 2011.
19. This is mentioned by Laprévote & Paron 2015, p. 110.
20. Mamdani 2012, p. 250.
21. This is also observed by Laprévote (2012, p. 103). As he – correctly – points out, it may be argued that a divestiture or withdrawal from a domestic core market is a greater concession from the beneficiary bank than the sale of a subsidiary in a non-core market.
22. Laprévote & Paron 2015, p. 100.

"the extent of the restructuring required depends on the intensity of the State intervention".[23] In other words: the higher the aid intensity, the more restructuring is needed.

More or less the same approach was taken by the Dutch committee of inquiry ("commissie-De Wit").[24] This committee listed the balance sheet reductions of six banks[25] and compared these balance sheet reductions with the aid intensity (as measured by the aid/RWA-ratio).

In my opinion, this approach may be a good starting point, but it is far from conclusive. The main problem of this approach is that the extent of restructuring is only measured by the balance sheet reduction. As is apparent from chapter 3, there are many restructuring measures and the balance sheet reduction is only one of them. In the end, it is about the total package of restructuring measures. A low balance sheet reduction can be compensated for by strict behavioural remedies, and vice versa, a far-reaching structural remedy can be compensated for by lenient behavioural commitments.[26] In section 6.3, I defined the treatment as the total package of restructuring measures. If one is interested in the treatment in its entirety, then an approach that only focusses on one aspect of the treatment, does not suffice. The approach taken by Laprévote & Paron and the committee-De Wit is therefore too narrow in the sense that it fails to take into account other restructuring measures.[27] The balance sheet reduction might be a "rough indicator", but it is not a sufficient metric for the severity of the restructuring plan.

Similarly, using the aid intensity as a metric for the amount of harm might be intuitively attractive. However, in my opinion, it is not a good metric. While the idea that a higher amount of State aid is more harmful than a lower amount of State aid might be true in many cases, there are situations in which equal amounts of aid (to firms that are of equal size) can result in different amounts of harm. Assume that two firms of exactly the same size receive exactly the same amount of State aid. If one of those two firms is efficient, while the other one is

23. Laprévote & Paron 2015, p. 100.
24. Commissie-De Wit II, p. 526.
25. Commerzbank, Dexia, KBC, ING, Lloyds Banking Group and Aegon.
26. This is also recognised by the committee of inquiry. The committee refers to the standpoint of the Commission with respect to the KBC-case. The Commission argues that the relatively low balance sheet reduction in that case can be explained by the severe behavioural commitments, by the high remuneration that KBC had to pay and by the fact that KBC was required to divest in its home market. See: Commissie-De Wit II, p. 526.
27. Laprévote & Paron recognise that "because of the diversity of the measures involved, it is difficult to compare the depth of individual restructuring plans", but they consider the balance sheet reduction to be "a good (if rough) indicator". Unfortunately, they do not explain why they take the view that it is a good indicator.

not, then the State aid to the inefficient firm is much more distortive and harmful than the (exact amount of) State aid to the other (efficient) firm. This example illustrates that the aid intensity is not always tantamount to the harm that the State aid causes.

To conclude, while there might be a positive relation between the aid intensity and the need for in-depth restructuring[28], this is not a one-to-one relationship. This is also apparent from the Commission's consideration in one of its Communications: "*as a general rule*, the more significant the reliance on State aid, the stronger the *indication* of a need to undergo in-depth restructuring".[29] This phrase might seem to indicate that there is a (one-to-one) relation between the aid intensity and the need for in-depth restructuring, but a thorough reading shows that the Commission uses two caveats in this phrase: "as a general rule" and "indication". Furthermore, the preceding and succeeding phrases both contain the notion that the specific situation (of each institution) should be taken into account.

In the Commission Staff Working Paper, the Commission stresses that great caution should be applied when making comparisons across bank State aid cases.[30] The Commission warns that the amount of aid is nothing more than a proxy of the level of competition distortions. In other words: the amount of aid cannot be equated with the harmfulness of the State aid. This means that comparing the bank State aid cases in terms of their harmfulness is not possible on the (sole) basis of the amount of aid.

Similarly, the Commission observes that "the size of the [balance sheet] reduction might not always reflect the quality of the structural measures undertaken".[31] This means that the severity of the treatment cannot be established by solely looking at the size of the divestments.

6.4.5 Concluding remarks

The difficulty of the application of the principle of equal treatment resides in the last part of the Aristotelian formula. Establishing *that* cases are different is not difficult. Determining *how* different the cases are, is much more difficult. The degree to which State aid cases are alike (in other words: the comparability of

28. As is suggested in the DG Competition Staff Working Document of 30 April 2010, p. 6: "The various Commission Communications […] set out a clear relationship between i) the size of aid and ii) the sound or distressed situation of the aid beneficiary on the one hand, and the extent of a need for restructuring on the other." See also WestLB, C43/2008, 12 May 2009, para. 64: "As the Commission has indicated in previous guidance, the depth of restructuring required to return to viability is likely to be in direct proportion to the scope and volume of the aid provided to WestLB on the one hand and to the fragility of its business model on the other hand."
29. Prolongation Communication 2011, point 15.
30. Commission Staff Working Paper 2011, p. 95-96.
31. Commission Staff Working Paper 2011, p. 96.

State aid cases) is almost impossible to establish. This is because it is not possible to combine all the characteristics of the treatment into one single metric (such as severity). So this approach is not a viable one. Another approach (one that focusses on the individual characteristics) will be explored in the following section.

6.5 The 'many-variables approach'

6.5.1 Finding a link between the characteristics of the cases and the treatments

The 'many-variables approach' is aimed at finding a (causal) link between the characteristics of the case and the characteristics of the treatment. If there is a link between a certain characteristic of the case and the treatment, then this link should be present in all bank State aid cases where that particular characteristic is present. Otherwise, the principle of equal treatment will be violated.

This approach entails the following steps. The first step would consist of mapping all the relevant characteristics of the banks that received State aid.[32] The next step would consist of mapping all the relevant characteristics of the State aid measures granted to those banks.[33] Together, the characteristics of the bank and the characteristics of the State aid measures constitute the characteristics of the "case". The third step would be to list all the characteristics of the "treatment" (i.e. all the modalities of the restructuring measures). The last step would be to link the characteristics of the case with the characteristics of the treatment. How can such a link be established?

Ideally, one should find two cases that are completely similar in all aspects except one. In other words: there is one characteristic on which the two cases differ; on all the other characteristics, the two cases score the same. So if the treatment of these two cases is different, the difference in treatment can only be caused by that one characteristic on which they differ. This way, the influence of that particular characteristic on the treatment can be established. In statistical terms, if a dependent variable (Y) is influenced by several independent variables (X1, X2, X3), then the influence of variable X1 can only be established, if one controls for the influence of the other independent variables (X2 and X3).

32. Those characteristics can be: the size of the bank, the systemic relevance of the bank, the business model of the bank, etc.
33. Those characteristics can be: the type of aid measure, the aid amount, etc.

This approach can only work if there are cases which are completely similar in all aspects but one. However, in reality there are so many differences between cases, that one can never find two cases which differ only on one characteristic. So the isolated influence of a particular characteristic cannot be established. To conclude, there is no statistical way to establish a (causal) link between the characteristics of the case and the characteristics of the treatment.

6.5.2 Other complicating factors

There are two complicating factors. Firstly, some characteristics can, by their very nature, never apply to certain State aid cases. The following example is a good illustration of this. If a bank is nationalised and its shareholders are expropriated without receiving any compensation, then this is a relevant characteristic. The fact that shareholders are expropriated means that there is an (ex ante) "own contribution", which reduces the need for (ex post) burden sharing measures to be included in the restructuring plan. Assume that Bank A and Bank B are both nationalised and assume further that the shareholders of Bank A receive a compensation for the fact that they are expropriated, and the shareholders of Bank B do not receive such a compensation. So Bank A and Bank B are different in this respect. This difference between Bank A and Bank B justifies a different treatment. Assuming that there are no other differences between Bank A and Bank B, the need for burden-sharing measures would be lower for Bank B, because the shareholders already contributed.

This example illustrates that the fact that expropriated shareholders receive no compensation, is a relevant characteristic of a State aid case. If two banks score differently on this characteristic, then this difference justifies a different treatment. However, the question whether or not the expropriated shareholders receive a compensation can only apply in the context of a nationalisation. This can be illustrated by extending the foregoing example with Bank C.[34] Assume that Bank C is supported by State aid measures, but without being nationalised. Then there is no compensation for the shareholders of Bank C, because of the simple fact that they were not expropriated, so there is no need for compensation. On this point, Bank C cannot be compared with Bank A and B.

Secondly, the 'many-variables approach' requires that all the data on the characteristics are known. However, this is not always the case, since not all information is publicly available. As explained in section 3.6.4, some data are regarded

34. This example also illustrates the importance of how the relevant characteristics are defined. The relevant characteristic could be defined as the fact that the shareholders of the Bank receive no compensation. It could also be defined as the fact that there is an ex ante own contribution by the shareholders of the Bank. If it is defined in the first mentioned way, then the characteristic can only apply in the context of a nationalisation. If, on the other hand, it is defined in the second mentioned way, then the characteristic can be applicable in other contexts as well.

as confidential. These data are therefore removed from the Commission decisions. Since these data are often of a quantitative nature, the non-visibility of these data hampers a quantitative analysis.

6.5.3 Concluding remarks

For the reasons set out above, the 'many-variables approach' is not feasible. In addition to the problems discussed above, there are some problems in determining the "cases" and "treatments". This will be discussed in the following section.

6.6 Problems in determining "cases" and "treatment"

In section 6.3, the concepts of "cases" and "treatment" were introduced. The following definitions were given: the "cases" are constituted by the banks that benefit from State aid measures, the "treatment" is constituted by the restructuring measures that are imposed on the beneficiary banks.[35] Although these definitions might seem straightforward, there are some problems when defining the cases and treatments in this way.

In the first place, the distinction between the treatment *by the Member State* and the treatment *by the Commission* is not always clear-cut. This PhD-study is not about the treatment of banks by their Member States, but about the treatment of banks by the Commission. The "treatment" was defined above as the restructuring measures that are imposed on the beneficiary banks. The restructuring measures are sometimes depicted as being imposed by the Commission. This may be true *de facto*, but from a strictly legal perspective, the restructuring

35. There is another way to define "treatment". "Treatment" could be defined along the lines of the judgment of the General Court of 8 April 2014 in Case T-319/11 (ABN AMRO). ABN AMRO argued that the acquisition ban that was imposed upon the bank, was significantly more strict than in some other cases. ABN AMRO referred to the following Commission decisions: the Commerzbank decision, the Lloyds decision, the KBC decision, the ING decision, the RBS decision, the LBBW decision, the Dexia decision the Sparkasse Köln/Bonn decision. The General Court considered that those other banks were compelled to undergo structural remedies (balance sheet reductions), a fact which may clearly have an effect on the degree of severity of the behavioural remedies. In this situation, the treatment is clearly interpreted as the imposition of the acquisition ban. The severity of this treatment (compared to the other banks) is justified by the fact that ABN AMRO did not have to undergo strict structural remedies. So the difference in treatment is justified by the difference in the cases – the difference being the imposition of structural remedies. The imposition of the structural remedies constitutes a relevant difference between ABN AMRO and the other banks. This means that the structural remedies are part of the "case" (instead of being part of the "treatment").

measures are proposed by the Member State concerned. Only if the Commission adopts a *conditional decision*, the restructuring measures are imposed by the Commission. If, on the contrary, the Commission adopts a *commitment decision*, the restructuring measures are commitments by the Member State. In that regard, the CJEU has held that the commitments form an integral part of the State aid measure.[36]

This essential difference between commitment decisions[37] and conditional decisions[38] – which was set out in section 3.7.3 – complicates the interpretation of "the treatment". For instance, when the Commission imposes a dividend ban on a beneficiary bank, then this dividend ban is part of the "treatment". But what if the Member State commits that the bank will comply with a dividend ban: is this dividend ban still part of the "treatment"? On the one hand, this dividend ban cannot be considered as a treatment by the Commission, since it was not imposed by the Commission. This would mean that the dividend ban is part of "the case" rather than being part of "the treatment". On the other hand: for the beneficiary bank itself (and its shareholders), there is no real difference between a dividend ban that is imposed by the Commission and a dividend ban that is imposed by the Member State. Moreover, it is not inconceivable that the Member State has proposed the dividend ban *in anticipation* of what the Commission would expect. In addition, it has been remarked that "commitment decisions risk being more a Commission's unilateral decision rather than a truly 'negotiated' solution".[39] For these reasons, it would not make sense to make a distinction between restructuring measures proposed by the Member State and restructuring measures imposed by the Commission.

In the second place, the distinction between the rescue of a bank and the restructuring of a bank is not always clear-cut. This makes it difficult to equate the restructuring plan with the treatment. For instance, the transfer of impaired assets to an Asset Management Company is obviously a State aid measure (and would thus be part of the "case"), but since the transfer of impaired assets constitutes a deleveraging effort, it also figures in the restructuring plan (and would thus be part of the "treatment").

Another example is the case of Banco de Valencia (BVA). In 2011, this Spanish bank faced a capital shortfall. Since BVA failed to raise capital from its key shareholders or from other private investors, the Bank of Spain took control over BVA and appointed the FROB as administrator. It was decided that BVA would be sold through an open, transparent and competitive tender procedure. In that context, CaixaBank purchased all the shares of the FROB in BVA at a price of EUR 1. The takeover of BVA was made under the condition that the FROB

36. Case C-287/12 P, para. 67. See also: Case T-814/14 (Banco Espirito Santo), para. 31.
37. Taken on the basis of article 4(3) of the Procedural Regulation.
38. Taken on the basis of article 7(4) of the Procedural Regulation.
39. Lo Schiavo 2013, p. 166.

would carry out a capital injection into BVA for an amount of EUR 4,5 billion and that the FROB would grant an asset protection scheme (APS). Should the takeover of Banco de Valencia by CaixaBank be considered as part of the "case" or as part of the "treatment"? On the one hand, the takeover necessitated several State aid measures (i.e. the capital injection of EUR 4,5 billion and the APS). Since it is so closely related to the rescue of BVA, the takeover could be considered as part of the "case". On the other hand, in the decision on Banco de Valencia, the Commission noted the following: "*As part of the Restructuring Plan*, Banco de Valencia will be bought by CaixaBank".[40] From this perspective, the takeover would be part of the "treatment". This example illustrates that some measures can be considered as both a rescue measure (and thus a State aid measure) and a restructuring measure. This makes it difficult to equate the "case" with the rescue measures and the "treatment" with the restructuring measures.

Thus, the picture can be a bit blurred sometimes. For instance, a Member State may nationalise a bank in the context of a rescue operation. The nationalisation may be achieved by expropriating the shareholders of the bank. The nationalisation is viewed positively by the Commission, because it constitutes burden-sharing by shareholders.[41] But how to characterise the nationalisation: as part of the "case" or as part of the "treatment"?

To conclude, it is difficult to pinpoint the "case" and the "treatment" when the abovementioned definitions are used. This forms yet another reason why the 'one-metric approach' and the 'many-variables approach' are not feasible. Indeed, these two approaches are based on the abovementioned definitions of cases and treatment.

Section 6.7 introduces another approach: the 'relevant characteristics approach'. When this approach is used, the problems in determining the cases and treatments are avoided. This is because the relevant-characteristics approach redefines "cases" and "treatment" – as will be discussed in section 6.7.2.

6.7 The 'relevant-characteristics approach'

6.7.1 Introduction

As I have discussed in sections 6.3 to 6.6, the CJEU-definition is unsatisfactory and the Aristotelian formula is unfeasible. The CJEU-definition is unsatisfactory, because it does not go further than merely establishing that cases are different. The Aristotelian formula is unfeasible, because it is not possible to establish

40. Banco de Valencia, SA.34053, 28 November 2012, para. 10.
41. This will be discussed in detail in section 12.5.

how different cases are. Therefore – as I have indicated in section 6.3.1 – I propose a different approach to the principle of equal treatment. My approach does not simply establish *that* bank State aid cases are different, it does not aim to find out *how different* bank State aid cases are; rather, it aims to find out *in what respect* bank State aid cases are different.

The starting point of my approach is the following. In order to establish that cases are different, it is important to first establish which differences should be taken into account. It goes without saying that only *relevant differences* should be taken into account. This leads to the question: which differences are relevant?

Relevant differences can only be based on *relevant characteristics*. If banks differ on certain characteristics, then those differences are only relevant if those characteristics are relevant. This leads to the question: which characteristics are relevant?

6.7.2 Identifying the relevant characteristics

It should be recalled that aid measures are only authorised by the Commission if it considers the aid measures to be compatible with the common market. In its bank State aid decisions, the Commission *states reasons* why it considers the aid measures to be compatible with the common market. The statement of reasons is based on the characteristics of the case.

To give an example: in several cases, the senior management of the beneficiary bank was replaced. This was noted positively by the Commission, because the change of management provided a valuable signal against moral hazard. The change of management was therefore one of the reasons to declare the aid compatible. The fact that the senior management of the bank has been replaced is thus a relevant characteristic of the case. To conclude, the characteristics that are being used in the State aid decisions as a reason to consider the aid measures to be compatible, are *relevant characteristics*.

In essence, the relevant-characteristics approach redefines “cases” and “treatment”. Under the relevant-characteristics approach, “cases” are constituted by banks that benefited from State aid and that are subject to restructuring measures. The “treatment” is no longer constituted by the restructuring measures, because the restructuring measures are now considered to be part of the “case”. The “treatment” is now constituted by the Commission’s assessment of the compatibility of the aid.

In that regard, it is important to keep in mind that the Commission's assessment of State aid measures consists of five steps:

- In the first place, it has to be assessed whether a certain aid measure constitutes State aid within the meaning of article 107(1) TFEU.
- In the second place – when the measure constitutes State aid – it has to be assessed whether the compatibility of the State aid measure should be assessed on the basis of Article 107(3)(b) TFEU (and thus on the basis of the Crisis Framework).
- In the third place – when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment – it has to be assessed whether the State aid meets the cumulative criteria of appropriateness, necessity and proportionality. NB: in the specific case of an asset relief measure, the measure has to comply with the criteria of the Impaired Assets Communication.
- In the fourth place – when the State aid is appropriate, necessary and proportionate – it has to be assessed whether a restructuring plan is required for the beneficiary bank.
- In the fifth place – when a restructuring plan is required – it has to be assessed whether the restructuring plan achieves long-term viability, burden-sharing and the limitation of competition distortions.

Thus, the "treatment" (i.e. the Commission's assessment whether the State aid is compatible) is constituted by the Commission's assessment whether the State aid is appropriate, necessary and proportionate and whether the restructuring plan achieves the three objectives (of restoration of long-term viability, burden-sharing and minimizing competition distortions). And the relevant characteristics of the case are the reasons that are given by the Commission to support its conclusion that the aid is compatible. The relevant-characteristics approach is aimed at identifying these relevant characteristics. To that end, the statements of reasons of all bank State aid decisions will be analysed and compared.

6.7.3 Consistency

In my view, the principle of equal treatment requires that the Commission consistently assesses whether the relevant characteristics are present in the case at hand. Otherwise, the decisional practice would be arbitrary. Admittedly, restructuring measures are tailor-made, but a tailor-made approach should not result in an arbitrary approach.[42] This PhD-study takes the view that the Commission's decisional practice cannot be in line with the principle of equal treatment if

42. This is recognised by the Commission in (point 30 of) its Restructuring Communication: "Measures to limit the distortions of competition *should be tailor-made* to address the distortions identified on the markets where the beneficiary bank operates following its return to viability, *while at the same time adhering to a common policy and principles*."

the decisional practice is not based on a well-defined State aid control framework.[43] The principle of equal treatment thus requires some kind of *assessment framework*. In the context of State aid to banks, the relevant assessment framework is the Crisis Framework. The Crisis Framework (which is based on the general framework of article 107 TFEU) contains general compatibility-criteria. These general compatibility-criteria are broken down into more specific assessment criteria.[44] These specific assessment criteria effectively correspond to the relevant characteristics. To give an example, if the characteristic "change of senior management" is welcomed by the Commission in a certain decision, then this characteristic should be an assessment criterion that has to be taken into account in all State aid cases. The aim of this PhD-study is to find out if the relevant characteristics are consistently taken into account by the Commission.

In addition, this PhD-study investigates how these relevant characteristics are *elaborated* by the Commission. For instance, the fact that the beneficiary bank is subject to an acquisition ban is a relevant characteristic.[45] Importantly, acquisition bans are characterised by various modalities, such as the scope of the ban, the duration of the ban and exceptions to the ban. These modalities can be considered as the 'characteristics' of the relevant characteristic. In my opinion, the Commission should not only take into account the acquisition ban (i.e. the relevant characteristic), it should also take into account the modalities of the acquisition ban (i.e. the 'characteristics' of the relevant characteristic). Since the term "characteristics of the relevant characteristic" might be confusing, I will refer to it as "the elaboration of the relevant characteristic". The elaboration of the relevant characteristics essentially means that the Commission should go 'one level deeper'.

Another example is the fact that the senior management of the bank has been replaced. This is a relevant characteristic.[46] But what exactly constitutes "senior management"? "Senior management" is a vague term that may be interpreted in various ways. Divergent interpretations of "senior management" would be contrary to the principle of equal treatment. The principle of equal treatment thus not only requires that the relevant characteristics are consistently used as assessment criteria, it also requires that the relevant characteristics are elaborated in a consistent manner.

43. This is in line with Klap 2012, p. 332: "Het gelijkheidsbeginsel speelt dus vooral een rol bij gebreke van beleidsregels of als er nog geen vaste gedragslijn tot ontwikkeling is gekomen waar het ter discussie staande besluit bij aansluit."
44. In the Commission's own words: "The fourth chapter of the Banking Communication, the Recapitalisation Communication and the Impaired Assets Communication translate these general principles into conditions specific for recapitalisations and impaired assets relief." This phrase can be found in several bank State aid decisions (see, for instance: KBC, C18/2009, 30 June 2009, para. 59).
45. As will be explained in section 13.9.
46. As will be explained in section 11.2.

Thus, in this PhD-study, the principle of equal treatment is effectively interpreted by means of the principle of consistency. This PhD-study takes the view that the principle of equal treatment is infringed when there are inconsistencies. As I have set out above, an inconsistency can occur at two levels. The first level concerns the question whether the Commission has consistently assessed whether the relevant characteristics are present in the case at hand. The second level concerns the way how the relevant characteristics are elaborated in the decisions.

An evolving policy

A consistent approach means that the approach should not be arbitrary. It does not mean that the approach can never change. Changes are allowed if they are legitimate. An evolving State aid control policy is thus possible. This was also recognised by Advocate-General Wahl in his Opinion in Case C-526/14:

> "The Commission must be able to adapt its analysis under Article 107 TFEU to the changing circumstances in the markets affected by the aid and, more generally, in the whole EU economy. The Commission should, furthermore, be able to learn from its past practice and consequently adapt its methods of evaluating notified aid by virtue of its accrued experience".[47]

I agree with this statement. Although this statement was made in the context of the principle of protection of legitimate expectations, it is also relevant to the principle of equal treatment (as interpreted in this PhD-study). Therefore, in my opinion, the principle of equal treatment does not necessarily have to be infringed when the Commission does not take into account a certain characteristic (which it had taken into account in earlier bank State aid cases), when this not-taking into account is due to a policy change. Nevertheless, this policy change should be justified and explained.

Relation to other principles of law

To some extent, the principle of equal treatment might overlap with other general principles of law, such as the principle of protection of legitimate expectations. It might even overlap with the obligation to state reasons. The aim of this PhD-study is not to provide a theoretic discussion of how the principle of equal treatment interacts and overlaps with other general principles of law. This PhD-study takes a *pragmatic* approach towards the principle of equal treatment, rather than a *dogmatic* approach. This PhD-study takes as a starting point that the decisional practice of the Commission should be 'fair'. The aim of this

47. Opinion in Case C-526/14, para. 68. The AG referred to established case-law: Case C-350/88, para. 33, and Case C-1/98 P, para. 52.

PhD-study is not to philosophise on when the decisional practice is 'fair'. As explained in the present chapter, I am of the opinion that the decisional practice cannot be considered 'fair' when it infringes the principle of equal treatment because of inconsistencies.

The importance of consistency

A striking observation is that the Commission attaches importance to consistency. In many decisions, the Commission referred to other decisions in order to underline that its decisional practice is consistent. This can be illustrated by the decision on the Greek bank ATE. In this decision, the Commission concluded that the sale of the viable activities of ATE Bank to Piraeus Bank did not constitute aid to the buyer (i.e. Pireaus Bank). In footnote 37 of the decision, the Commission referred to similar cases in which the sale did not constitute aid to the buyer.[48]

In some decisions, the Commission makes an effort to explain the difference between the case at hand and similar cases. To give an example, in the decision on Dunfermline, the Commission explained the key difference between the case of Dunfermline and the similar – but different – case of Bradford&Bingley.[49] This illustrates that the Commission is concerned with treating cases consistently.

Another example is the decision on Amagerbanken, in which the Commission noted the following: "*In line with the Restructuring Communication and the Commission's decisional practice* in the Kaupthing Luxemburg and Northern Rock decisions, burden-sharing is considered to be sufficient when the shareholders lost control of the bank and all financial stakes therein without any compensation".[50]

These examples illustrate that the Commission attaches importance to consistency. This is a striking observation. What makes this observation even more striking is that according to established case-law, the Commission is not bound by its previous decision-making practice. Indeed, as was discussed in section 5.20, the CJEU has held that "it is only in the context of Article 87(3)(b) EC that it is necessary to assess the legality of a Commission decision declaring that new aid does not fulfil the requirements for application of that derogation, and *not in the light of its previous decision-making practice*, assuming that the latter is established".

The fact that the Commission attaches importance to consistency provides a justification for the relevant-characteristics approach (which requires the Commission to consistently take into account the relevant characteristics).

48. ATE, SA.35460, 3 May 2013, footnote 37. The Commission referred to Fionia Bank and Dunfermline Building Society.
49. Dunfermline, NN19/2009, 25 January 2010, para. 113.
50. Amagerbanken, SA.33485, 25 January 2012, para. 106.

6.7.4 Limitations of the relevant-characteristics approach

The relevant-characteristics approach entails analysing the characteristics that are mentioned in the bank State aid decisions. However, it is not inconceivable that there are some additional circumstances that are relevant, but that are not explicitly mentioned in the decisions.

There may be other factors at play. For instance, it is sometimes suggested that Neelie Kroes (a Dutch national who was European Commissioner for Competition in the period 2004-2009) was particularly tough on the Dutch banks, in order to avoid creating the impression that she was favouring of Dutch banks.[51]

Lobbying of Member States at the Commission is also a relevant factor. In that regard, the personality of the negotiators may be relevant. This is illustrated by the negotiations that ING conducted with the Commission. The person who was initially leading the negotiations on behalf of ING was said to operate with Dutch bluntness.[52] This direct communication-style worked counterproductively. In September 2012, he was replaced by someone else who was said to operate in a more diplomatic manner. This example underlines that the personality of the negotiators may be relevant.

Since the relevant-characteristics approach focusses on the relevant characteristics that are mentioned in the decisions, it does not take into account other potentially influencing factors. This is a limitation of the relevant-characteristics approach.

6.7.5 Concluding remarks

On one level, the cases are obviously not equal (because there are differences among banks, differences among State aid measures and differences among the restructuring plans). However, on a higher level, the cases are equal: in each case, the Commission should take into account the relevant characteristics. In that respect, cases are equal. Consequently, the banks should be treated equally. The "treatment" is constituted by the assessment of whether the aid is compatible. An equal treatment thus entails that every assessment should be based on the relevant characteristics. If there are cases in which the Commission does

51. De Kok 2015, p. 234 (footnote 105); Murphey 2013, p. 285.
52. Een 'klein mannetje' met een grote missie. Eli Leenaars wacht hoge beloning als hij ING langs lastige Brusselse klippen laveert, FD 25 September 2012. Hollandse directheid van ING botst met diplomatieke aanpak Brussel, FD 24 September 2012. Tegen beter weten in, FD 6 October 2012.

not assess the presence of the relevant characteristics, then these cases are not treated equally (as compared to other cases in which the Commission did take into account the relevant characteristics).

To conclude, this PhD-study takes the view that a correct application of the principle of equal treatment requires the following. Firstly, the Commission should asses in every bank State aid case whether the relevant characteristics are present in that case. In other words: the relevant characteristics should be consistently used as assessment criteria. Secondly, the Commission should elaborate the relevant characteristics in a consistent manner.

The principle of equal treatment as defined in this PhD-study does not completely correspond with the CJEU-definition of the principle of equal treatment. In my opinion, the principle of equal treatment is interpreted very narrowly by the CJEU – this was one of the main conclusions of chapter 5.[53] It should be stressed that this PhD-study does not suggest that the CJEU should change or broaden its interpretation of the principle of equal treatment. However, this PhD-study takes the view that – irrespective of the question whether the CJEU-definition is infringed – the decisional practice is not 'fair' when the relevant characteristics are not consistently taken into account by the Commission. And as discussed in section 6.3.4, the Commission should not only be concerned by the CJEU-definition of the principle of equal treatment, but also by other possible interpretations of the principle of equal treatment.

6.8 The relevant context

6.8.1 Introduction

One of the central ideas of this PhD-study is that the context matters. There is no standard way of rescuing and restructuring a beneficiary bank. This means that there are different 'end states'. Indeed, some beneficiary banks continue to exist as a standalone entity, while other banks are being wound-down (liquidated), taken-over by another bank or split-up into a 'good bank' and 'bad bank'. The 'end state' or final situation that the beneficiary bank finds itself in, constitutes a relevant context. Accordingly, the following contexts can be distinguished:

- The <u>C-context</u> means that the beneficiary bank continues to exist as a standalone entity. So the "C" stands for **<u>c</u>**ontinuing to exist as a standalone entity.
- The <u>W-context</u> is understood as the context in which the beneficiary bank is put in wind-down. So the "W" stands for **<u>w</u>**ind-down.

53. See, in particular, section 5.20.4 and 5.21.

- The T-context means that the beneficiary bank is taken-over by another bank. So the "T" stands for **t**ake-over (or **t**ransfer).
- The S-context means that the beneficiary bank is split-up into a 'good' part and a 'bad' part. So the "S" stands for **s**plit-up. Within the S-context, a distinction can be made between the S/T/W-context and the S/C/W-context.

An illustration of the C-context: the case of ING
During the financial crisis, ING benefited from several State aid measures, such as a capital injection and an impaired asset measure. The restructuring plan for ING envisaged a spectacular downsizing of the bank: in total, ING's balance sheet would reduce by 45%. Although ING had to reduce the size of its balance sheet by 45%, ING nonetheless continued to exist as a standalone entity.

An illustration of the W-context: the case of Factor Banka
Factor Banka, a Slovenian bank, experienced difficulties in 2013. The Slovenian State decided to wind-down Factor Banka. Factor Banka would thus not be immediately liquidated; rather, it would be wound-down over a period of three years. This orderly winding-down would allow Factor Banka to realise a significantly higher yield from the realisation of its assets (loans, securities, fixed assets, etc.) than it would be the case under immediate liquidation or bankruptcy. In order to stabilise the liability side of Factor Banka's balance sheet while proceeding to its orderly winding down, the Slovenian State granted Factor Banka a State guarantee on newly issued debt. The purpose of State aid to a bank in the W-context is thus to allow an orderly winding down and to maintain confidence while avoiding negative spillover effects such as possible bank runs.

An illustration of the T-context: the case of Banco de Valencia
The T-context usually follows a nationalisation of the beneficiary bank, after which the State sells all the shares in the beneficiary bank to the acquiring bank. To give an example: the rescue and restructuring of Banco de Valencia (BVA) consisted of a takeover by CaixaBank. Following an open, transparent and competitive tender procedure, CaixaBank purchased all the shares of the FROB in BVA at a price of EUR 1. The takeover of BVA was made under the condition that the FROB would carry out a capital injection into BVA and that the FROB would grant an asset protection scheme (APS). The State aid was thus used to facilitate the take-over of BVA's activities. In other words: while BVA ceased to exist as independent legal entity, the State aid allowed BVA's activities to continue to exist within CaixaBank.

An illustration of the S/T/W-context: the case of AB Ukio bankas
AB Ukio bankas was split-up into a 'good' part and a 'bad' part. In the decision on AB Ukio bankas, the 'good' part is referred to as the Transfer Package, while the 'bad' part is referred to as Rump Ukio. The 'good' part (approximately 80% of Ukio bank's assets or approximately 80% of its liabilities) was sold and transferred to Siauliau bank. The 'bad' part (consisting of the unsold assets and liabilities remaining under the legal entity of AB Ukio Bankas) was being wound-down.

6.8.2 The main differences between the relevant contexts

The difference between the C-context and the S-context lies in the number of potential beneficiaries. When a bank is split-up in the S/T/W-context, there are two (potential) beneficiaries: the remaining activities in the Rump bank and the transferred activities. As illustrated by the aforementioned case of AB Ukio Bankas, the transferred activities might constitute an economic continuity. By contrast, when a bank is split-up in the C-context, then there is only one beneficiary. For instance, ING was a so-called bank insurance company: it consisted of a banking branch and an insurance branch. As part of the restructuring, ING had to divest its insurance activities, but only the bank was considered to be the beneficiary of the State aid. The divested insurance activities were not considered to constitute an economic continuity.

The difference between the S/T/W-context and the S/C/W-context is the existence of an acquiring bank. In the S/T/W-context, there is an acquiring bank. In the S/C/W-context, there is no acquiring bank. This means that even if certain activities are to be sold, the case is still labelled as S/C/W if there is not yet an acquiring bank. A split-up into a bad bank and bridge bank takes thus place in a S/C/W-context.

The difference between the T-context and the S/T/W-context is that in the T-context, all the bank's activities are taken over by another bank. More specifically, the acquiring bank acquires all the *shares* in the beneficiary bank.

6.8.3 The relevance of the context

One of the central ideas of this PhD-study is that the context matters. So, in addition to the *relevant characteristics*, I distinguish between the *relevant contexts*. The relevant context can be considered as a relevant characteristic on a higher level. For instance, the fact that the beneficiary bank is split-up, is relevant, because it influences the way in which the relevant characteristics are interpreted. In addition, some characteristics are only applicable in certain contexts.

6.9 Introduction to the following seven chapters

6.9.1 The structure of the following seven chapters

The present chapter has set out how the Commission decisions will be analysed in this PhD-study; the actual analysis of the Commission decisions will take place in the following seven chapters.

To a large extent, the way how the following seven chapters are structured is guided by the way how the Commission decisions are structured – or more precisely: by the way how the assessment-part of the decisions is structured. As was explained in section 3.5,[54] the Commission's assessment of State aid measures consists of five steps. These five steps are presented in the following table. The first column indicates how I have labelled the steps; the second column indicates what the steps in the assessment entail; the third column indicates in which chapter of this PhD-study the five steps are discussed. As the table indicates, each of the following seven chapters will discuss the characteristics that are relevant to a particular step of the Commission's assessment. For instance, the characteristics that are relevant to the assessment that the State aid measure is appropriate, necessary and proportionate (i.e. the first stage of the compatibility-assessment) are discussed in chapter 8.

Steps in the Commission's assessment of bank State aid measures		
Preliminary steps	Assessment of whether a measure **constitutes State aid** within the meaning of Article 107(1) TFEU.	Chapter 7
	- when the measure constitutes State aid: Assessment of whether the **compatibility** of the State aid measure should be assessed on the basis of Article 107(3)(b) TFEU.	Chapter 7
First stage of the compatibility-assessment	*- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,* *- in case of a guarantee or recapitalisation:* Assessment of whether the State aid measure meets the criteria of **appropriateness, necessity and proportionality**.	Chapter 8
	- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment, *- in case of an asset relief measure:* Assessment of whether the asset relief measure complies with the criteria of the **Impaired Assets Communication**.	Chapter 9

54. And reiterated in section 6.7.2.

Intermediate step	- *when the State aid is appropriate, necessary and proportionate/complies with the IAC-criteria:* Assessment of whether a **restructuring plan** is required for the beneficiary bank.	Chapter 10
Second stage of the compatibility-assessment	- *when a restructuring plan is required:* Assessment of whether the restructuring plan meets the three **restructuring objectives**: • restoring long-term viability • burden-sharing • minimising competition distortions	 Chapter 11 Chapter 12 Chapter 13

The term "preliminary steps" already indicates the relative importance that these steps have in this PhD-study. Although every step in the Commission's assessment will be discussed, this PhD-study focusses on the compatibility-assessment. Why this special focus on the compatibility-assessment? It should be recalled that this PhD-study is about State aid *to banks*. What makes the assessment of bank State aid special is that the Commission created a specific assessment framework (i.e. the Crisis Framework), which addresses the *compatibility* of bank State aid. This justifies a special focus on the compatibility-assessment. As a consequence, every step in the assessment that precedes the compatibility-assessment, is regarded (in this PhD-study) as a preliminary step.

While the main focus of this PhD-study is on the compatibility-assessment, this PhD-study focusses in particular on the second stage of the compatibility-assessment. This is due to the following: in my view, the Commission attaches the most importance to the second stage of the compatibility-assessment.[55] For this reason, the chapters 11, 12 and 13 – which discuss the characteristics that are relevant to this second stage of the compatibility-assessment – can be considered as the main chapters of this PhD-study.

6.9.2 Presenting the relevant characteristics

The following chapters will discuss the relevant characteristics. Each relevant characteristic will be presented as follows:

* *The fact that…*

55. As was explained in section 3.5.2, the Commission was quite lenient in the first stage of the compatibility-assessment, while being very strict in the second stage of the compatibility-assessment. For this reason, I am of the opinion that the Commission attaches more importance to the second stage. The relative importance of both stages will be elaborated in section 8.1.4.

With respect to each relevant characteristic, the following three questions will be addressed: *Firstly*, why is this a relevant characteristic? *Secondly*, has the Commission consistently taken into account this relevant characteristic? *Thirdly*, how is this relevant characteristic elaborated in the decisions?

6.9.3 "Taken into account"

The aim of this PhD-study is to identify the relevant characteristics and to analyse whether the Commission has consistently *taken into account* these relevant characteristic. It might be worthwhile to clarify what is understood by "taken into account".

In essence, 'taking into account' requires that the relevant characteristic is *mentioned* in the decision. Indeed, if a relevant characteristic is not mentioned at all in a decision, then the Commission did not show that it took into account the relevant characteristic. Accordingly, such a decision is categorised as a decision in which the relevant characteristic is not taken into account.

The situation is less clear when a relevant characteristic is mentioned in a decision. The fact that the relevant characteristic is mentioned does not automatically mean that the relevant characteristic is taken into account by the Commission. It depends on the way how it is mentioned. Indeed, when the Commission only mentions a relevant characteristic in a bank State aid decision, without using it as an assessment criterion, then this relevant characteristic is not really "taken into account" by the Commission. There are four possibilities in which a relevant characteristic can be mentioned, as will be discussed below.

Option 1: Mentioned in the assessment-part of the decision
Section 3.6.2 explained the structure of the Commission decisions. Although there are some differences in the way how the decisions may be structured, every decision consists of a description-part and an assessment-part. A relevant characteristic that is mentioned in the assessment-part of the decision is clearly taken into account by the Commission in its assessment.

Option 2: Mentioned in the description-part of the decision
If a relevant characteristic is purely mentioned as a description, then this PhD-study does not categorise the decision as a decision in which the relevant characteristic is taken into account. This was the case with the market characteristics discussed in section 13.3. In several decisions, the market presence was mentioned as a description of the beneficiary bank, rather than as an indication of the competitive impact of the aid.

Nevertheless, if a restructuring measure is only mentioned in the description-part of the decision, the fact that it is mentioned in the decision means that it is taken into account. Indeed, in its compatibility-assessment, the Commission takes into account the restructuring measures.

Option 3: Mentioned in the Rescue Decision

In a few instances, the relevant characteristic is not mentioned in the Restructuring Decision but in the Rescue Decision. For instance, the Restructuring Decision on Anglo/INBS does not mention management changes nor remuneration restrictions. However, management changes and remuneration restrictions were mentioned in the Rescue Decision on Anglo Irish Bank.[56] How should this case be categorised? As a case in which the Commission took into account the relevant characteristic or as a case in which the relevant characteristic was not taken into account? In that regard, it should be noted that in the Rescue Decisions, the Commission usually holds that "this assessment is without prejudice to that which the Commission will reach following the analysis of the restructuring plan if these measures are maintained in it".[57]

Option 4: Mentioned in the decision on the bank support scheme

As will be explained in section 11.2, the Commission did not explicitly mention the replacement of senior management in the assessment-part of the decisions on the Danish banks Amagerbanken, Roskilde Bank and Fionia Bank. However, in the decision on the Danish winding-up scheme, the Commission noted positively that removing control from OldBank's management was a measure to minimise moral hazard.[58] Since the cases of Amagerbanken, Roskilde Bank and Fionia Bank are in line with the principles of the winding-up scheme, it can be argued that the relevant characteristic is indirectly mentioned in these cases. Whether a relevant characteristic is taken into account by the Commission is thus a matter of interpretation.

56. Anglo Irish Bank, N356/2009, 26 June 2009, para. 66.
57. See, for instance: Anglo Irish Bank, N356/2009, 26 June 2009, para. 73; AIB/EBS, SA.33296, 15 July 2011, para. 83.
58. N407/2010, para. 43.

6.10 Conclusion

How can the principle of equal treatment be applied to bank State aid cases? The current chapter focussed on this fundamental question. To that end, the CJEU-definition[59] and the Aristotelian formula[60] were discussed. As I have set in the present chapter, I am of the opinion that the CJEU-definition is unsatisfactory and that the Aristotelian formula is unfeasible. I therefore propose a different approach towards the principle of equal treatment: the 'relevant-characteristics approach'.

The 'relevant-characteristics approach' entails the following. Firstly, the Commission should asses in every bank State aid case whether the relevant characteristics are present in that case. In other words: the relevant characteristics should be consistently used as assessment criteria. Secondly, the Commission should elaborate the relevant characteristics in a consistent manner.

As set out in chapter 1, the aim of this PhD-study is to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. Using the 'relevant-characteristics approach', this framework effectively consists of a list of relevant characteristics that the Commission should take into account.

Which relevant characteristics should be included on this list? In other words: which characteristics are relevant to the Commission's assessment of bank State aid cases? Another crucial question is whether the Commission has consistently taken into account these relevant characteristics. The following seven chapters of this PhD-study will provide an answer to these questions.

59. Under the CJEU-definition, the principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.
60. The Aristotelian formula requires that "like cases must be treated alike, and unlike cases unalike, proportionate to the differences between them".

Chapter 7. Preliminary steps in the Commission's assessment

7.1 Introduction

The main focus of this PhD-study is on the compatibility-assessment (i.e. the assessment of whether the State aid is compatible with the internal market).[1] As a corollary, this PhD-study treats the steps that precede this compatibility-assessment as preliminary steps.[2] There are essentially two preliminary steps; and these will be discussed in Part I and Part II of the current chapter. The first preliminary step is the question whether the aid measures constitute State aid within the meaning of Article 107(1) TFEU. The second preliminary step is the question on which legal basis the compatibility of the State aid has to be assessed.

Part I. The first preliminary step

7.2 Existence of State aid within the meaning of Article 107 (1) TFEU?

When the Commission assesses State aid measures, the first step is the question whether the aid measures constitute State aid within the meaning of Article 107 (1) TFEU. This step does not concern the compatibility of State aid, but the *existence* of State aid. It is – from the viewpoint of this PhD-study – a preliminary step, since the question of the compatibility only becomes relevant when the aid measures fall within the scope of Article 107(1) TFEU.

The question whether a particular measure constitutes 'State aid' within the meaning of Article 107(1) TFEU is sometimes a difficult question which requires a thorough assessment. As discussed in chapter 2, there is an entire body of case-law about the notion of 'State aid', which indicates that the

1. Why this focus on the compatibility-assessment? This will become clear in section 7.2.
2. An overview of all the steps in the Commission's assessment of bank State aid measures was provided in section 6.9.1.

question whether a particular measure constitutes State aid is a difficult one. However, with respect to State aid *to banks*, this question is usually easy to answer. Indeed, it is often quite clear that the measures taken by Member States to rescue ailing banks constitute State aid. Moreover, when Member States notify aid measures in favour of banks to the Commission, they usually agree that these measures constitute State aid, but they consider this aid to be compatible. The point at issue is thus often the compatibility of aid, rather than the existence of aid.[3]

Nevertheless, there are sometimes questions about the existence of State aid. In that respect, the main issues that arise, are the question whether the aid is imputable to the State and the question whether the State acted as a market economy investor. These questions will be discussed in section 7.3 and 7.4. Another question concerns the identification of beneficiaries of State aid. This will be discussed in section 7.5.

7.3 State resources and imputability

As explained in section 2.3.1, financial support measures can only be categorised as State aid, when they are *imputable to the State*. Imputability is one of the cumulative conditions of Article 107(1) TFEU. Although section 2.3.1 already discussed the imputability-criterion from a general viewpoint, with respect to State aid to banks, the following two issues are of particular relevance.

7.3.1 Intermediary

Sometimes, a Member State does not grant aid to a bank directly, but rather grants the aid *through an intermediary*, such as a state-owned public company. Are such aid measures imputable to the State?

This question was addressed in several decisions. In these decisions, the Commission referred to settled case-law from the Court of Justice. For instance, the Court of Justice has clarified that "imputability to the State of an aid measure taken by a prima facie independent body (for instance, a public undertaking) can be inferred from a set of indicators arising from the circumstances of the case, such as the fact that the body in question cannot take the contested decision

3. This explains the focus on the compatibility-assessment. In addition, the focus on the compatibility-assessment can be explained by the fact the compatibility of State aid is assessed on the basis of a special framework (i.e. the Crisis Framework), while the existence of State aid is assessed on the basis of settled case-law.

without taking into account the requirements of the public authorities, or the fact that, apart from factors of an organic nature which link it to the State, it has to take into account the directives issued by the State before taking the decision allegedly involving State aid".[4] In addition, the Court of Justice has held that the fact that private persons participate in the running of an entity is not sufficient to exclude imputability to the State of the measure at issue.[5]

In all bank State aid cases involving an intermediary, the Commission came to the conclusion that the aid measures were imputable to the State. For instance, in the case of the *Fondo de Reestructuración Ordenada Bancaria* (FROB), the intervening authority providing the measures, the Commission considered that the FROB *essentially acted as the prolonged arm of the State*.[6]

Sometimes, the imputability-question is more complicated; for instance, when private investors are involved in the intermediary. This was the case in Spain, where an Asset Management Company (AMC) was set up: the *Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria* (SAREB). Ailing Spanish banks could transfer their impaired assets to this AMC. The AMC thus provided asset relief to the beneficiary banks.[7] Although private investors had a majority holding in the AMC[8], the Commission concluded that the transfer of impaired assets to the AMC involved State resources.[9] This conclusion was based on three reasons. *First*, the AMC was set up for a public policy objective (i.e. to help troubled Spanish banks by transferring their most risky assets off their balance sheet and thus by helping them implement their restructuring plans). The Commission added that the "genesis in public policy considerations is also underlined by the fact that the AMC was set-up between the Spanish authorities and its international partners as a result of the MoU and the special legal setting implemented by the Spanish authorities for the AMC."

4. AB Ukio Bankas, SA.36248, 14 August 2013, para. 56; Quinn Insurance, SA.33023, 12 October 2011, para. 67.
5. Quinn Insurance, SA.33023, 12 October 2011, para. 68; Caja Castilla-La Mancha (CCM), NN61/2009, 29 June 2010, para. 101; Banca Romagna Cooperativa (BRC), SA.41924, 2 July 2015, para. 39.
6. Liberbank, SA.35490, 20 December 2012, para. 63.
7. Asset relief measures – also referred to as impaired asset measures – will be discussed in-depth in chapter 9 of this PhD-study.
8. In para. 24 of the Liberbank decision, it was explained that the capital structure of the AMC consists of a non-majority holding of the FROB and a majority holding by private investors.
9. Liberbank, SA.35490, 20 December 2012, para. 64. The same consideration can be found in Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 77.

Second, the FROB was the single largest investor in the AMC and the bonds issued by the AMC were guaranteed by the State. *Third*, the Spanish public authorities were keeping a high degree of oversight over the AMC's decisions and overall management issues.[10]

Under the French refinancing scheme, the *Société de Refinancement des Activités des Etablissements de Credit* (SRAEC) was set up (later renamed *Société de Financement de l'Economie Française* (SFEF)).[11] The SRAEC was a refinancing company. It issued securities guaranteed by the French State[12] and it used these funds to grant loans to eligible banks in France or to subscribe to shares or debt instruments issued by those banks. The French refinancing scheme was thus an indirect guarantee scheme: instead of directly guaranteeing securities issued by the banks, the French State guaranteed the securities issued by the SRAEC, which in turn subscribed to securities issued by the banks.

According to the French State, the scheme did not classify as State aid, since the scheme was intended to function as a normal market mechanism.[13] The SRAEC was not completely State-owned: it was owned for 34% by the French State, while the other 66% of its capital was held by certain banks in France.[14] Contrary to the French State, the Commission concluded that the operations of the SRAEC were imputable to the French State.[15] Notwithstanding the fact that the SRAEC was not state-owned, it was *state-controlled*. Several elements led to this conclusion. Firstly, a representative of the French State attended the meetings of the board of administration and he had a right of veto. Secondly, the French State bore the economic risk of the operations of the SRAEC.

7.3.2 Intervention by a DGS

In several bank State aid cases, the Deposit Guarantee Scheme (DGS) is used to rescue and restructure ailing banks. With respect to the intervention by a DGS, two remarks are in order.

In the first place, where a DGS carries out measures *other than paying out depositors in the liquidation of a bank*, it should comply with State aid rules. This was observed by the Commission in several cases. For instance, the Resolution scheme of the Hellenic Deposit and Investment Guarantee Fund

10. Liberbank, SA.35490, 20 December 2012, para. 64.
11. N548/2008, 30 October 2008.
12. Because of this guarantee, the SRAEC had a Aaa-rating. See: https://www.moodys.com/research/Moodys-assigns-Aaa-to-debt-of-SRAEC-SFEF-guaranteed-by–PR_166628.
13. N548/2008, 30 October 2008, para. 39.
14. N548/2008, 30 October 2008, para. 5.
15. N548/2008, 30 October 2008, para. 55. See also Gebski 2009.

(HDIGF) assisted in the rescue of Proton Bank. The Commission noted that – unlike the deposit guarantee part of the HDIGF, which was created following the implementation of an EU Directive – the Resolution scheme of HDIGF was not created to implement EU legislation. In other words: Greece was not bound by an obligation originating from EU law when it decided to create the Resolution scheme of HDIGF. The Commission therefore concluded that the Resolution scheme was imputable to the Greek State.[16]

The same conclusion was reached in the case of the Italian DGS. The *Fondo di Garanzia dei Deposanti del Credito Cooperativo* (i.e. the Italian DGS) facilitated the transfer of the ailing BRC to ICCREA by making up the negative difference between the transferred assets and liabilities The Commission held that "unlike the pay-out of covered deposits by DGSs in cases of liquidation of banks, which are mandatory under Directive 94/19/EC, the FGDCC's interventions in transfers of assets and liabilities in the context of national insolvency proceedings as in the case at hand are discretionary and fulfil a public policy mandate laid down in Italian law at the discretion of the State".[17]

In the second place, deposit guarantee schemes are often *financed by contributions from banks*. This raises the question whether the support measures involve State resources. The determining factor is whether the financial means by which the aid measure is funded, are *under public control*.[18] This is the case when the contributions *are made compulsory by state legislation and are managed and apportioned in accordance with that legislation*.[19] In that regard, the Commission has held that "the mere fact that resources are financed in part by private contributions is not sufficient to rule out the public character of those resources since the relevant factor is not the direct origin of the resources but the degree of intervention of the public authority within the definition of the measure and its method of financing".[20]

The two remarks made in the present subsection are reprised in point 63 of the 2013 Banking Communication. In essence, this provision of the 2013 Banking Communication codifies that the intervention by a DGS may constitute State aid.

16. Nea Proton Bank, SA.34488, 26 July 2012, para. 32.
17. Banca Romagna Cooperativa (BRC), SA.41924, 2 July 2015, para. 41.
18. AB Ukio Bankas, SA.36248, 14 August 2013, para. 55. The decision on MKB (SA.40441, 16 December 2015, para. 82) also speaks of "under public control".
19. Danish winding-up scheme, N407/2010, 30 September 2010, para. 28; AB Ukio bankas, SA.36248, 14 August 2013, para. 54; Caja Castilla-La Mancha (CCM), NN61/2009, 29 June 2010, para. 97.
20. Banca Romagna Cooperativa (BRC), SA.41924, 2 July 2015, para. 36.

7.4 Market Economy Investor Principle (MEIP)

Section 2.3 discussed the cumulative conditions that have to be met for a measure to fall under the definition of State aid. One of these conditions is that the measure must confer an 'advantage' to the recipient. In order to be able to assess whether an aid measure entails an advantage, the Commission applies the Private Investor Test – also referred to as Private Investor Principle, Market Economy Investor Principle (MEIP) or Market Economy Operator Principle (MEOP).[21] The essence of the private investor test is that the behaviour of the State is compared to that of a hypothetical private investor. If the State acts like a private investor would do (under similar circumstances), then the measure contains no aid-element. In other words: the hypothetical private investor serves as the benchmark against which the economic rationality of a State intervention is assessed.

7.4.1 Application of the MEOP in bank State aid cases

In its assessment of whether the Member State acted as a market economy operator when it rescued a bank, the Commission took into account the following relevant characteristics of the case:

The fact that there is no reasonable return on the investment

With respect to recapitalisation measures, the Commission held that a market economy investor expects a reasonable return on his investment and that if a firm is in difficulty, it is normally not justified to assume a reasonable return.[22] When a State recapitalises a bank, it does not act as a private investor, if a private investor would not be willing to inject capital *at all* or not at such a low level of remuneration.[23] If there is no prospect of profit, a market economy investor would not be willing to enter in such a transaction.[24]

With respect to a transfer of impaired assets to an Asset Management Company, the Commission noted in several decisions that the transfer value of the portfolio was (equal to the real economic value and) higher than the market

21. In this PhD-study, the terms "private investor" and "market economy investor" are used as synonyms.
22. Anglo Irish Bank, SA.32504, 31 March 2010, para. 95.
23. For instance, in the decision on CCM (NN61/2009, 29 June 2010, para. 110), the Commission held that the low level of remuneration was not justified from a market investor's perspective.
24. Quinn Insurance, SA.33023, 12 October 2011, para. 74.

value. This led to the conclusion that the transaction could not be considered to be in line with the Market Economic Operator Principle.[25] Indeed, a market economy investor would not be willing to purchase assets at a price above market value.

The fact that the transaction is on market terms

Interestingly, in two recent cases, the Commission considered that the impaired asset measures did not constitute State aid. On 10 February 2016, the Commission adopted a decision on the Italian securitisation scheme (*Garanzia sulla Cartolarizzazione delle Sofferenze* – "GACS") and a decision on the Hungarian Asset Management Company (*Magyar Reorganizációs és Követeléskezelő Zrt* – "MARK").[26]

Under the Italian scheme[27], each participating bank would set up a securitisation structure: an individually managed, private securitisation vehicle would buy NPL's from the bank and pool them. The funding necessary to buy these NPL's is raised through issuing senior and junior notes to private investors. The senior notes would benefit from a State guarantee (which will only become active after the originating bank has sold to private investors at least 50% plus one share of the junior tranche).

The Commission noted positively that the risk for the Italian State is limited, as only the guarantee only applies to the senior tranche. In addition, the guarantee fee will be based on a market benchmark (a basket of CDS prices of Italian-based companies) and correspond to the level and duration of the risk the State takes granting the guarantee. Taking risk and remuneration together, the Commission concludes that the scheme is at market terms. The MEIP is therefore met and, accordingly, the guarantee does not constitute State aid.

The Commission has been criticised for being too lenient in these two cases.[28] Italy was very keen on avoiding the impaired asset measures being classified as State aid, because such a classification would trigger resolution and the application of the bail-in tool.[29] In that regard, it should be noted that many shareholders of Italian banks are families and small investors rather than professional investors.

25. Abanka/Banka Celje, SA.38522, 16 December 2014, para. 102; Liberbank, SA.35490, 20 December 2012, para. 69.
26. Italian securitization scheme, SA.43390; MARK, SA.38843.
27. The GACS is mentioned in the IMF Staff Report for the 2016 Article IV Consultation. The other Italian initiative "Atlante" is also mentioned.
28. See, for instance, FD 28 January 2016, 'Europa te mild voor Italiaanse banken'.
29. Pursuant to Article 32(4)(d) BRRD, a bank is 'failing or likely to fail' when extraordinary public financial support (i.e. State aid) is required. Chapter 4 of this PhD-study gave a detailed account of the relation between State aid and resolution.

The fact that the aid measure is driven by public policy considerations

In many cases, the State intervention was driven by the desire to avoid a further deterioration in the financial position of the bank, which would represent a threat to the stability of the financial system.[30] The State is obviously concerned about maintaining financial stability, whereas a private investor is only concerned by a reasonable return on his investment. In that regard, the Commission recalled that "public, economic and social policy considerations must be disregarded in the assessment of the principle of the private investor in a market economy".[31]

This point was also illustrated in the case of the Greek T Bank. In this case, the argument was raised that the aid amount would be lower than what the HDIGF/the State already paid and might still have to pay if T Bank had been let to go bankrupt. The Commission held that it was not a valid comparison: "any such payment by the HDIGF or by the State to indemnify depositors would not be made *as a market operator* but would be made *as a public authority*".[32]

The fact that the Member State notified the measure as State aid contributes to the conclusion that the Member State did not act in line with the MEOP.[33]

The fact that private investors are participating

The fact that there is a private investor participating in the same investment on the same terms as the State is a relevant characteristic. This is illustrated by the case of Dexia. The split-up of Dexia (October 2011) comprised the sale of Dexia Banque Internationale à Luxembourg (Dexia BIL) to a Qatari investment group (Precision Capital SA) and the Luxembourgish State. Precision Capital acquired 90% of Dexia BIL, the other 10% was acquired by the Luxembourgish State. Since Luxembourg was participating *on the same conditions* as Precision Capital, the Commission considered that Luxembourg was acting as a private investor.[34]

However, the concomitant provision of capital from private investors does not always lead to the conclusion that the state is acting as a market economy investor. This is because the investment decisions of the private investors are sometimes – especially if market conditions are bad – likely to be influenced by

30. See, for instance: UNNIM Banc, SA.33095, 30 September 2011, para. 44; MKB, SA.40441, 16 December 2015, para. 83.
31. Dexia, C9/2009, 26 February 2010, para. 126. See also: Danish guarantee scheme, para. 32. In this decision, the Commission remarked that the Member State only benefits indirectly "by avoiding spill over effects to the entire economy, a consideration that is irrelevant to a private investor".
32. T Bank, SA.34115, 16 May 2012, para. 29.
33. See, for instance: Abanka/Banka Celje, SA.38522, 16 December 2014, para. 98.
34. Dexia BIL, SA.34440, 25 July 2012, para. 94.

the very fact that the State is investing alongside them. Therefore, the provision of capital from private investors may be concomitant but not necessarily 'pari passu'.[35]

In a similar vein, the Commission noted in its Opening Decision on LBBW that (according to the statement of Germany) many of the owners of LBBW would not have provided the capital injection without the guarantee measure from the Land Baden-Württemberg.[36]

In fact, there are several cases in which the State did not act in line with the MEOP, even though private investors were participating in the State intervention. In that regard, the Commission recalled that the "public intervention must not only be made in parallel with other private interventions, but the interventions needs to be proportionate to each party's interests, and must be provided under the same conditions and industrial rationale".[37]

The fact that the aid measure follows prior aid measures

Many banks received State aid not only once, but several times. This can have an impact on the MEOP, because the aid measure must be seen in the context of earlier State aid granted to the bank.[38] Sometimes, it is not possible to view an aid measure separately from prior aid measures to the beneficiary bank.

This can be illustrated by the case of Lloyds Banking Group ("LBG"). LBG received a capital injection (of £14.7 billion) in January and June 2009. Afterwards, in the context of the so-called Seaview project, LBG undertook a rights issue of £13.5 billion, in which the shares were offered to the existing shareholders at a deep discount to the stock market price. As a result of the capital injections in January and June 2009, the UK State had acquired a 43,5% stake in LBG. To maintain its 43,5% stake, the UK government participated in the Seaview project and subscribed to 43,5% of the newly issued shares.

With respect to the State participation in the Seaview project, the UK authorities and LBG argued that a private investor would have participated in the share offer in similar circumstances since the shares were offered to the existing shareholders at a deep discount to the stock market price. Not participating would mean foregoing the possibility to purchase these shares at a discounted price.[39]

The Commission did not accept these arguments. The Commission noted that the State's participation in the Seaview project followed other aid measures granted to LBG (i.e. the £14.7 billion recapitalisation in January and June 2009).

35. Portuguese recap scheme, para. 61; Swedish recap scheme, para. 26.
36. Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 42.
37. Danish guarantee scheme, para. 32.
38. Bank of Ireland, para. 167; Northern Rock, 28 October 2009, para. 90; LBG, para. 128; CCM, para. 113; Alpha Bank, 2015, para. 68.
39. Lloyds Banking Group (LBG), N428/2009, 18 November 2009, para. 128.

The State participation in the Seaview project could not be considered as free of aid, because the opportunity to buy shares at a deep discount price exclusively resulted from an aid measure granted in the prior months, i.e. the £14.7 billion recapitalisation. A private investor would not find itself in the situation of the State since it would not have granted the £14.7 billion recapitalisation. The Commission therefore concluded that the State participation in the Seaview project did fulfil the market economy operator principle.[40]

The fact that actual private investors are unwilling to invest in the bank

In some instances, the actual conduct of private investors is taken into account by the Commission in its application of the MEOP. This is illustrated by the case of SNS REAAL. When SNS REAAL experienced financial difficulties, first a private sector solution was sought. This private sector solution proved, however, not to be possible and the Dutch State had to intervene and rescue SNS REAAL.[41] In its assessment of whether the Dutch State was acting as a market economy investor, the Commission took into account the fact that the private sector solution failed, because this fact made clear that private investors did not want to rescue SNS REAAL on similar terms to those accepted by the Dutch State.[42]

Similarly, in the decision on Anglo Irish Bank, the Commission referred to the fact that the Irish State was only investing because no market economy operator was willing to invest on similar terms.[43]

Footnote 2 to point 15 of the IAC provides that a guarantee (with respect to impaired assets) is presumed to constitute State aid when the beneficiary bank cannot find any independent private operator on the market willing to provide a similar guarantee.

To conclude, the fact that private investors are unwilling to invest in the bank, is a relevant characteristic (and taken into account in several decisions[44]).

The fact that private investors are not able to invest in the bank

In some decisions, the Commission did not only refer to the *unwillingness* of private investors to support the bank, but also to the *ability* of private investors to rescue the bank. For instance, in its decision on Fortis, the Commission considered that "for the purposes of applying the principle of the market economy investor, the conduct of the State must be compared with that of private investors in the situation prevailing at the precise moment that the transaction was effected

40. Lloyds Banking Group (LBG), N428/2009, 18 November 2009, para. 128.
41. SNS REAAL, SA.35382, 22 February 2013, para. 25.
42. SNS REAAL, SA.35382, 22 February 2013, para. 49.
43. Anglo Irish Bank, C11/2010, 31 March 2010, para. 95.
44. UNNIM Banc, para. 44; FIH, 11 March 2014, para. 86; CCB, 2014, para. 103.

– that is to say investors who were greatly constrained in their financing by the almost complete drying-up of the interbank market – and not the situation of the State, which, as a public authority, experienced no great difficulty in raising finance".[45]

By the same token, the Commission noted in its decision on Royal Bank of Scotland (RBS) that "in the current state of financial markets, no market operator *would be able to guarantee the size proposed*".[46] Also in the decision on Anglo/INBS, the Commission considered that "it would not be possible for a market operator to obtain such financing".[47]

7.4.2 Concluding remarks

In many bank State aid cases, it is more or less straightforward that the State did not act as a private investor. There are therefore many decisions in which the Commission limited itself to the observation that under the then-current market conditions, a market economy investor would not be willing to grant such a measure on a comparable scale and on similar terms.

Sometimes, a Member State argues that it acted in line with the MEOP.[48] In these cases, the Commission has to assess (in its decision) whether the MEOP is met. By contrast, when a Member State recognises that the aid measure constitutes State aid in the sense of Article 107(1) TFEU, then there is less need for the Commission to dwell on the MEOP.[49]

7.5 Identification of beneficiaries

Of crucial importance is the identification of the beneficiaries of State aid. While the beneficiary bank is obviously the beneficiary of State aid, the identification of beneficiaries is not always that simple – as will be illustrated in the present section.

45. Fortis, NN42/2008, 3 December 2008, para. 50.
46. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 119.
47. Anglo/INBS, SA.32504, 29 June 2011, para. 103.
48. One of these cases is the case of ING, which was discussed in depth in section 5.2. Other examples are: BPN, 2012, para. 65; the Irish guarantee scheme, para. 36-37.
49. The impact of the position of the Member State on the extensiveness of the Commission's assessment can be illustrated by the following recital from the decision on the French refinancing scheme: "France rejects the classification of the notified scheme as State aid and the Commission *must therefore* carry out a detailed analysis of the classification." (N548/08, para. 54)

7.5.1 Aid to the investors of the bank?

When a Member State rescues a failing bank, this is not only beneficial to the bank itself, but also to those who invested in the bank. Indeed, the bailout of a failing bank prevents that the investors lose their investments in that bank. The Commission has recognised that investors usually benefit from the bailout. As will be explained in detail in chapter 12, *shareholders and subordinated debt holders* are normally required to contribute to the restructuring of the bank. This "own contribution-requirement" addresses the fact that these investors would otherwise benefit from the State aid.

Are *retail depositors* beneficiaries of State aid? This question was addressed in the case of Bradford&Bingley (B&B). In this case, the retail deposit book of B&B was sold to another institution (together with several other assets and liabilities), while the remainder of B&B's business was wound-down. The Commission noted that the main beneficiaries of the State aid measure were the retail depositors of B&B: the aid measure enabled the transfer of some of B&B's business (including the retail deposit book). Without this aid measure and the subsequent transfer of the retail deposit book, the deposit holders would have suffered serious difficulties in accessing their deposits. In addition, they might also have lost some of their deposits.[50] The depositors thus clearly benefited from the State aid measure. Nevertheless, the Commission remarked that retail depositors are individuals and therefore not considered as *undertakings*. Since Article 107(1) TFEU only applies to 'undertakings', depositors fall outside the scope of the State aid rules.[51] Moreover, even if there were some undertakings among the depositors, the aid should be considered 'de minimis' aid and therefore outside State aid control.[52]

In several other bank State aid decisions, the Commission reiterated its considerations of the decision on Bradford&Bingley to underline that retail depositors fall outside the scope of the State aid rules.[53] The approach of the Commission with respect to depositors is thus consistent.

50. Bradford&Bingley, NN41/2008, 1 October 2008, para. 34.
51. What is an 'undertaking'? This question was addressed in section 2.3.2.
52. Bradford&Bingley, NN41/2008, 1 October 2008, para. 34.
53. Dunfermline, 25 January 2010, para. 44; CajaSur, 8 November 2010, para. 52; Caja Castilla-La Mancha (CCM), 29 June 2010, para. 120; Kaupthing Bank Luxembourg, 9 July 2009, para. 37; Kaupthing Bank, Finnish Branch, 21 January 2009, para. 32.

7.5.2 *The relevance of the context*

Section 6.8 introduced the concept of the "relevant context".[54] This concept is especially relevant in relation to the question which entities benefit from the State aid measures.

If a beneficiary bank continues to exist as an independent and standalone bank (i.e. the C-context), then the identification of the potential beneficiary of State aid is quite simple: namely the beneficiary bank. However, in other contexts, the identification of potential beneficiaries of State aid is less straightforward.

In the T-context, the activities of the ailing bank are transferred *to another entity* (i.e. the acquiring bank). Thus, in this context, there is another entity; and this entity could also be a beneficiary of State aid. This means that in the T-context, there are usually two potential beneficiaries: i) the economic activities sold, and ii) the acquiring bank.

In the S/T/W-context, there are even more potential beneficiaries. In this context, the ailing bank is split-up into a bad bank (to be wound-down) and a good bank (to be sold). Thus, in this context, there are usually three potential beneficiaries: the economic activities sold, ii) the acquiring bank, and iii) the activities that remain in the bad bank.

Aid to the acquiring bank?

Point 20 of the Restructuring Communication recognises that the sale of a bank may involve State aid to the buyer. The transfer of an ailing bank to the acquiring bank is usually facilitated by the State. The fair value of the transferred liabilities may exceed the fair value of the transferred assets. The difference (i.e. the funding gap) is covered by the State (which constitutes State aid).[55]

There is an advantage to the buyer if the price that the buyer paid for the transferred activities is too low and does not reflect the market price. In that regard, point 49 of the 2008 Banking Communication laid down the following requirements: i) the sales process should be open and non-discriminatory, ii) the sale should take place on market terms, iii) the sales price for the assets and liabilities

54. The C-context means that the beneficiary bank continues as a standalone entity. The T-context means that the bank is taken over by another bank. The W-context means that the bank will be wound down. The S/T/W-context means that the bank is split-up into a bad bank (to be wound-down) and a good bank (to be sold). The S/C/W-context means that the bank is split-up into a bad bank (to be wound down) and a good bank (that continues to exist as a standalone entity).
55. See, for instance: T Bank, SA.34115, 16 May 2012, para. 20.

involved should be maximised. These requirements are reprised in point 80 of the 2013 Banking Communication.[56] If these requirements are met, then the transaction does not entail State aid to the buyer.

The open and transparent tender is regarded by the Commission as a competitive process that ensures that aid is limited to the minimum. In one of its decisions, the Commission expressed that it considered an open tender procedure as "a proper way to gauge market interest and to determine the selling price".[57]

It is worth stressing that an open and transparent tender is relevant for three reasons. *In the first place*, an open and transparent tender ensures that the sale price reflects the market price. This means that there is no aid to the buyer. *In the second place*, since an open and transparent tender ensures that the sale price reflects the market price, the aid is limited to the minimum.[58] *In the third place*, an open and transparent tender ensures equal opportunities for potential bidders.[59] The first and second reason for the relevance of an open and transparent tender ('no aid to the buyer' and 'aid limited to the minimum') are in essence two sides of the same coin. Indeed, there is an advantage to the buyer if the price that the buyer paid for the transferred activities is too low and does not reflect the market price. At the same time, this means that the State aid is not limited to the minimum.

In most cases involving a sale of the ailing bank, the requirement of an open and transparent tender was met. However, there are a few exceptions, as is illustrated by the cases discussed below.

In the case of the sale of the viable activities of ATE Bank (a Greek bank), the Commission observed that the Bank of Greece had only contacted a limited number of banks. In its decision, the Commission indicated that it would normally consider that contacting such a limited number of buyers does not allow it to conclude that the tender was open. However, the Commission went on to observe that at that time, the situation of Greece was very specific, because foreign banks were trying to reduce their exposure to the Greek economy while Greece was in an unprecedented and protracted recession. The Commission therefore accepted that, since the international investment banks that the

56. The requirement that the sales process should be open and non-discriminatory is now phrased as "open, unconditional and non-discriminatory". However, in my opinion, this is only a cosmetic difference and does not entail a substantive difference between the 2008 Banking Communication and the 2013 Banking Communication.
57. Banco CAM, SA.34255, 30 May 2012, para. 150.
58. See, for instance: Eik banki, SA.31945, 6 June 2011, para. 41.
59. This is relevant for the assessment of the competition distortions.

Bank of Greece contacted indicated that there was no foreign interest in ATE Bank, it was not necessary to contact other foreign banks as it was reasonable to anticipate that they would show no interest for the activities of ATE Bank.[60] Similar observations can be found in the decisions on other Greek banks, such as T Bank, Panellinia Bank and Cooperative Bank of Peloponnese.[61]

As mentioned before, the split-up of Dexia (in October 2011) comprised the sale of Dexia Banque Internationale à Luxembourg (Dexia BIL) to a Quatari investment group (Precision Capital SA) and the Luxembourgish State. Precision Capital acquired 90% of Dexia BIL, the other 10% was acquired by the Luxembourgish State. In the Opening Decision on Dexia BIL, the Commission took the view that the sale process for Dexia BIL had not been open, transparent and non-discriminatory, because the sale process had been restricted to bilateral negotiations with a number of potential buyers without a call for tenders.[62] By contrast, in its decision of 25 July 2012, the Commission concluded that the sale of Dexia BIL did not constitute State aid. This decision was based on additional information that the Commission received following the opening decision. The Commission noted that the sale of Dexia BIL was subject to a fairness opinion.[63] The Commission examined this fairness opinion and noted that the price of the transaction lied within the range of the fairness opinion. The price paid could therefore be regarded as a market price.[64]

To conclude, in most cases, the Commission arrived at the conclusion that the sales process was open and transparent (and that aid to the acquirer could therefore be excluded). In some cases, the sales process was not completely open and transparent. However, the Commission has consistently taken into account elements that could justify why the sales process was not entirely open and transparent.

Aid to the transferred activities?

In order to assess whether the transferred activities are beneficiary of aid, the Commission assesses whether these transferred activities constitute an *economic continuity* of the beneficiary bank.[65] The aid measure might constitute

60. ATE, SA.35460, 3 May 2013, para. 53.
61. T Bank, 16 May 2012, para. 34; Panellinia Bank, 16 April 2015, para. 62; Cooperative Bank of Peloponnese, 17 December 2015, para. 42.
62. Dexia BIL, SA.34440, 25 July 2012, para. 51.
63. A fairness opinion is an evaluation by a third party of whether the terms of the transaction are fair.
64. Dexia BIL, SA.34440, 25 July 2012, para. 90-92.
65. The following factors are usually taken into consideration: the subject-matter of the transfer, the price of the transfer, the identity of the shareholders or the owners of the undertaking which takes over and of the initial undertaking or the economic logic of the operation. Hypo Group Alpe Adria (HGAA), SA.32554, 3 September 2013, para. 112.

an advantage to the transferred activities, if these activities would have been put in run-off without the aid measure.[66] In other words: if the aid measure allowed the continuation of the transferred activities (within the acquiring bank), then the transferred activities are a potential beneficiary of the aid.[67]

The determining factor is whether the transferred activities constitute an economic continuity of the beneficiary bank. This is the case when the *functional identity continues to exist*.[68] If most assets, infrastructure, IT systems, employees and customers of the failing bank are transferred to the acquiring bank, then the identity of the sold economic entity continues to exist and the sold part of the failing bank can be considered as a commercial entity that perpetuates the commercial activity of the failing bank.[69]

In the T-context, usually *all of the beneficiary bank's activities* are transferred. This clearly constitutes a continuation of the economic activity and there is not much discussion whether the transferred activities are a beneficiary of the aid. By contrast, in the S/T/W-context, the question whether the transferred activities are a beneficiary of the aid is much more complicated, for only a part of the bank's activities are transferred. Does the functional identity of the bank's activities continue to exist in case of a split-up?

A *sale 'en bloc'* is as indicator of the continuation of the economic activity. In its decision on the Greek T Bank, the Commission noted that the aid measure allowed a sale 'en bloc': all the key productive banking assets were transferred (employees, branches, deposits, loans and headquarters). The Commission concluded that there was an advantage to the economic activity that continued to exist due to the sale of T Bank's assets 'en bloc'.[70]

The Commission takes into account the *business model* of the transferred activities. In the decision on Hypo Group Alpe Adria (HGAA), the Commission noted that the business model of the entities to be sold was different from the business model of HGAA. Also the client base was different: HGAA focussed on large-scale business and key clients; in contrast, the entities to be

66. See, for instance: Amagerbanken, SA.33485, 25 January 2012, para. 91.
67. What is the relevance of the classification of the transferred activities as beneficiary of State aid? As a result of this classification, the transferred activities are subject to a restructuring plan. Any potential acquirer should take this into account. As Laprevote & Paron (2015, p. 96-97) note, this might complicate the rescue and restructuring of an ailing bank.
68. Eik banki, SA.31945, 6 June 2011, para. 26; Kommunalkredit Austria (KA), SA.32745, 19 July 2013, para. 65.
69. Eik banki, SA.31945, 6 June 2011, para. 26-28.
70. T Bank, SA.34115, 16 May 2012, para. 30.

sold would focus on SME business. The Commission concluded that once the operational entities would be sold and HGAA would cease to exist there would be no continuation of the economic activity of HGAA. [71]

An important aspect is whether the transferred activities are *integrated into* the acquiring bank's existing structure. For instance, in the case of Roskilde Bank, the transferred branches were integrated into the branch network of the acquiring banks. The Commission concluded that the transferred branches cannot be seen as being separate from the buyers.[72] In other words: there is no continuation of the functional identity of the economic activities of the bank.

In its decision on Kaupthing Bank Luxembourg, the Commission observed that the buyers acquired only some of the Bank's liabilities, without any infrastructure that would enable them to continue to offer banking services on the market independently. The Commission held as follows: "The deposits of the Bank's former customers will be immediately transferred to Crédit Agricole Belgique or Keytrade Bank accounts and will therefore be immediately integrated into the buyer's existing structures. Consequently, even though the aid has made possible the orderly and 'en bloc' transfer of deposits from the Belgian branch to the buyers, this does not constitute the continuation of an independent undertaking but the transfer of a 'distinct set of liabilities'".[73]

In some cases, there was no integration. For instance, Nationwide – which took over the Dunfermline business – intended to operate Dunfermline *as a separate brand*.[74] This contributes to the finding of a continuation of the functional identity.

To conclude, where the previous subsection showed that the Commission always arrived at the conclusion that aid to the buyer could be excluded, the current subsection showed that the conclusions with respect to the transferred activities is not always the same. In some cases, the transferred activities are considered as beneficiary of State aid, while in other cases, they are not. The determining factor is whether the functional identity of the transferred activities continues to exist.

Aid to the activities that remain in the 'Rump bank'?

In the S/T/W-context, the ailing bank is split-up into a good bank (to be sold) and a bad bank (to be wound-down). This bad bank is usually referred to as the "Rump bank". Is the Rump bank a beneficiary of State aid?

71. Hypo Group Alpe Adria (HGAA), SA.32554, 3 September 2013, para. 111-115.
72. Roskilde Bank, NN39/2008, 5 November 2008, para. 68.
73. Kaupthing Bank Luxembourg, N344/2009, 9 July 2009, para. 47.
74. Dunfermline, NN19/2009, 25 January 2010, para. 49.

In several decision, the Commission held as follows: even though the Rump bank is to be liquidated, it will still carry out some economic activities, albeit on a small scale and in a running-down objective. Such activities may include offering banking services to their remaining customers. Since these activities are also carried out by other operators on the market, the Rump bank will potentially compete with them. The Rump bank is therefore considered as a beneficiary of State aid.

The determining factor is thus *whether the Rump bank will carry out economic activities*. In some instances, this is not the case. Consequently, in these cases, the Rump bank is not a beneficiary of State aid. For instance, in the case of AB Ukio bankas, the Commission noted that Rump Ukio was under bankruptcy proceedings and no longer had a banking license. In the decision, it was indicated that Rump Ukio may carry out certain limited activities in relation to loans, such as extension of repayment terms, restructuring of loans, realising certain securities etc. to secure the value of assets. However, it may not issue additional loans or provide drawdowns from existing facilities.[75] The Commission therefore concluded that Rump Ukio was not a beneficiary of State aid. [76]

7.5.3 The relevance of the identification of the beneficiaries

Why does it matter who the beneficiaries of State aid are? The answer lies in the fact that the Commission assesses the compatibility of the State aid on the basis of the restructuring plan. When there are several beneficiaries, then the State aid *to each beneficiary* should be compatible with the internal market. This means that each beneficiary should be subject to restructuring measures.

To give an example, in the case of Amagerbanken, there were two beneficiaries: i) the sold economic activities, and ii) the remaining business. In the first place, the Commission assessed whether the restructuring measures would ensure the viability of the sold economic activities, whether there was sufficient burden-sharing with respect to these activities, and whether the competition distortions were satisfactorily addressed.[77] In the second place, the Commission assessed whether the winding-down of the remaining business was conducted in an orderly manner, whether there was sufficient burden-sharing with respect to these activities, and whether the compensatory measures were sufficient to limit the competition distortions.[78] Thus, for each of the two beneficiaries, the Commission assessed whether the State aid was compatible in light of the restructuring measures.

75. AB Ukio bankas, SA.36248, 14 August 2013, para. 34.
76. AB Ukio bankas, SA.36248, 14 August 2013, para. 50.
77. Amagerbanken, SA.33485, 25 January 2012, para. 102-112.
78. Amagerbanken, SA.33485, 25 January 2012, para. 113-136.

Part II. The second preliminary step

7.6 Assessment on the basis of Article 107(3)(b) or (c) TFEU?

When an aid measure falls under the scope of Article 107(1) TFEU, it is prohibited. However, it may be declared compatible if it falls under one of the exceptions provided for in Article 107(2) and (3) TFEU. With respect to State aid to ailing banks, the relevant provisions are 107(3)(b) and (c) TFEU. Art. 107 (3)(b) TFEU provides that *aid to remedy a serious disturbance in the economy of a Member State* may be considered to be compatible with the internal market. Pursuant to Art. 107(3)(c) TFEU, *aid to facilitate the development of certain economic activities or of certain economic areas* may be considered to be compatible with the internal market. The compatibility of State aid to banks can thus be assessed on the basis of Article 107(3)(b) and (c) TFEU.

7.6.1 The relevance of the choice of legal basis

The choice of legal basis determines which framework of assessment is used: under Article 107(3)(b) TFEU, the Crisis Framework is the relevant framework of assessment, whereas under Article 107(3)(c) TFEU, the relevant framework of assessment is constituted by the principles of the R&R-guidelines. Since the principles of the Crisis Communications allow for more flexibility than the R&R-guidelines,[79] the choice of legal basis is thus quite relevant.

7.6.2 "to remedy a serious disturbance in the economy"

As was explained in chapter 3, the Commission adopted the Crisis Framework in October 2008. Pursuant to this Crisis Framework, the Commission chose to use Article 107(3)(b) TFEU as the legal basis for the compatibility-assessment. Article 107(3)(b) TFEU empowers the Commission to find that aid is compatible with the internal market if it is intended "to remedy a serious disturbance in the economy of a Member State". In essence, the choice for Article 107(3)(b) TFEU was prompted by the financial crisis, which created "exceptional circumstances where financial stability at large is at risk".

Thus, in the Crisis Communications, the Commission justified its choice for 107 (3)(b) TFEU as legal basis for the compatibility-assessment. In addition, the Commission assessed in each bank State aid decision on which legal basis the aid measures had to be examined. In that regard, the relevant assessment

79. The differences between the R&R-guidelines and the Crisis Communications were explained in section 3.4.2.

criterion is thus whether the State aid is intended to remedy a serious disturbance in the economy. In every case (taken after the adoption of the 2008 Banking Communication), the Commission came to the conclusion that the aid measure in question was aimed at remedying a serious disturbance in the economy. How did the Commission come to this conclusion? In that regard, the following recital is illustrative of the Commission's reasoning:

> "The Commission considers that the present scheme concerns the entire German banking industry. It does not dispute the analysis of the German authorities that *the current global financial crisis* has made access to liquidity more difficult for financial institutions across the board and *has also eroded confidence* in financial institutions' creditworthiness. If the issues of lack of liquidity and lack of confidence are not addressed, it will result not only in difficulties for the banking sector but, owing to that sector's pivotal role in providing financing to the rest of the economy, will also have a *systemic effect* on the German economy as a whole. The Commission does not dispute that the present scheme is designed to address the problems of the lack of liquidity and lack of confidence that are currently striking German financial institutions. Therefore it finds that the scheme *aims at remedying a serious disturbance* in the German economy".[80]

Although this recital was taken from the decision on the German bank support scheme, the same considerations can be found in decisions on the bank support schemes of other Member States. The cited recital is thus illustrative of the Commission's reasoning. The main elements of this reasoning are the following. Firstly, there are exceptional circumstances created by the financial crisis. In that regard, the Commission noted that the global financial crisis has led to a "lack of liquidity and lack of confidence". Secondly, the Commission refers to the "systemic effect on the (German) economy". This element relates to the systemic importance of banks. These two (interrelated) elements can be summarised as follows: in a crisis situation, the failure of a systemic important bank can create a serious disturbance in the economy. State aid measures aimed at avoiding the fall of a systemic important bank are thus aimed at remedying a serious disturbance in the economy.

In decisions on aid measures to individual banks, the Commission usually refers to its considerations from its decision on the bank support scheme of the Member State concerned. This can be illustrated by the following recital from the decision on the German LBBW in which the Commission referred to "its recent approval to the prolongation of the German Rescue package.

80. German bank support scheme, N512/2008, 27 October 2008, para. 46.

> "The Commission acknowledged in its recent approval to the prolongation of the German Rescue package that the threat of a serious disturbance in the German economy continues and that measures supporting banks are apt to remedy a serious disturbance in the German economy".[81]

In this recital, the Commission mentions the "threat of a serious disturbance in the German economy". This corresponds to the first element of the Commission's reasoning (i.e. the financial crisis which created exceptional circumstances where financial stability at large is at risk).

The second element (i.e. the systemic importance – sometimes referred to as 'systemic relevance'[82] – of the bank) is usually elaborated in decisions on aid measures to individual banks. For instance, in the decision on the German LBBW, the Commission considered as follows:

> "Given the *systemic importance* of LBBW and the significance of its lending activities for specific regional markets, its cross border presence, and its integration and cooperation with other public sector banks, the Commission accepts that *its failure would have entailed serious consequences for the German economy.* The aid must therefore be assessed under Article 87(3) (b) of the EC Treaty".[83]

To conclude, the criterion 'aimed at remedying a serious disturbance in the economy' is thus substantiated by two (interrelated) elements: i) the financial crisis, and ii) the systemic importance of the bank. Given the relevance of these elements, the following subsection will delve into the question of when a bank has systemic importance.

7.6.3 Systemic importance

When is a bank systemically important? In that regard, it might be interesting to take a look at how "systemic importance" is defined in the financial regulation. Systemically important banks have received attention from financial regulators in an effort to address the "too-big-to-fail problem". In economic terms, the "too-big-to-fail problem" constitutes a negative externality. As explained in section 3.2, the fall of a bank may have dramatic repercussions on the stability of the financial system. Systemically important banks represent a higher risk for the financial system. Accordingly, to compensate for this higher risk, these banks should comply with higher own funds requirements.

81. Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 47-48.
82. 'Systemic relevance' and 'systemic importance' are used as synonyms.
83. Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 48.

In that context, the Financial Stability Board (FSB) published a policy framework concerning 'systemically important financial institutions' (SIFI's).[84] SIFI's are defined as "financial institutions whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity". As part of the effort by the FSB effort to address the "too-big-to-fail problem", the Basel Committee on Banking Supervision (BCBS) developed a methodology to identify G-SIFI's.[85] The measurement approach is based on five indicators: i) size, ii) interconnectedness, iii) substitutes or financial institution infrastructure, iv) cross-jurisdictional activity, and v) complexity. These indicators are also enumerated in Article 131(2) CRD IV, which employs the term 'global systemically important institutions' (G-SII's).

The identification of systemically important banks in the financial regulation serves a specific purpose: in order to reduce the probability of failure of systemically important banks, these banks have to comply with higher loss-absorbency requirements. The identification of systemically important banks in State aid control serves a different purpose: it is aimed at establishing whether the aid is appropriate to remedy a serious disturbance in the economy. Because the concept of "systemic importance" serves a different purpose in State aid control, the Commission is not bound by any definition of "systemic importance" given in the financial regulation.

How is "systemic importance" defined by the Commission? The following recital is illustrative of the Commission's approach towards the notion of "systemic importance".

> "Given the systemic importance of BCP – being one of the leading banks in Portugal – and the significance of its lending activities for the Portuguese economy, the Commission accepts that its failure to satisfy strengthened capital requirements would have entailed serious consequences for the Portuguese economy".[86]

This recital illustrates that the Commission takes into account the systemic importance of the beneficiary bank. It also illustrates that the systemic importance is almost taken as a given: it is only substantiated by the fact that

84. FSB, Policy Measures to Address Systemically Important Financial Institutions, 4 November 2011.
85. BCBS, Global systemically important banks: assessment methodology and the additional loss absorbency requirement, November 2011. The assessment methodology was updated in July 2013: BCBS, Global systemically important banks: updated assessment methodology and the higher loss absorbency requirement, July 2013.
86. Banco Comercial Portugues (BCP), 30 August 2013, para. 77. A similar consideration can be found in BFA, SA.34820, 27 June 2012, para. 49.

BCP is one of the leading banks in Portugal. In the decision on RBS, the Commission gave a more detailed explanation of the systemic importance of the bank:

> "Given the global nature of RBS's banking activities, given that RBS is one of the leading 'high street' banks in the UK especially in the retail, SME and corporate segments, given the significance of its lending activities for the UK economy, and given its intense financial relationships with other banks, the Commission accepts that RBS is a systemically relevant bank. The Commission, therefore, concludes that the collapse of RBS would entail a serious disturbance for the UK financial sector and thus the UK economy. The aid must therefore be assessed under Article 107(3)(b) TFEU".[87]

The recitals that are cited above might create the impression that only large banks are systemically relevant. This impression is not correct, for the Commission has consistently held that even small banks may have systemic relevance. Amagerbanken, Eik Bank, Fionia Bank, Kaupthing Bank Luxembourg, LCCU, Banif, Banco Privado Portugues and Carnegie Bank were all characterised as small banks. Notwithstanding their small size, these banks were considered to be systemically important (in the sense that their bankruptcy would undermine trust in the financial system).[88]

With respect to these small banks, the Commission used the same reasoning to substantiate their systemic relevance.[89] The following recital from the decision on Amagerbanken can serve as an illustration of the Commission's reasoning:

> "*The financial crisis has created exceptional circumstances* in which the bankruptcy of one bank may undermine trust in the financial system at large, both at national and international level. *That may be the case even for a bank of small size*, such as Amagerbanken, and particularly so in the case of a relatively small economy such as Denmark where counterparts may tend not to distinguish between individual banks, thus extending the lack of confidence generated by the failure of one bank to the whole sector. Given the great uncertainty due to the financial crisis and the necessity of

87. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 129.
88. See: Fionia Bank, N560/2009, 25 October 2010, para. 68. Amagerbanken, SA.32634, 6 June 2011, para. 48.
89. Only in the case of the Portuguese bank Banif, the Commission used a different reason. The Commission noted that Banif had a high market share on Madeira and the Azores. The Commission therefore concluded that "even though the bank is de facto only a small-sized financial undertaking, its local presence gives it some systemic importance." Banif, SA.34662, 21 January 2013, para. 54.

> external funding for the Danish banking sector, as previously stated in the Commission decision of 28 June 2010 extending the Danish guarantee scheme, a lack of confidence in the Danish financial system could severely affect the whole Danish economy".[90]

It is noteworthy about this recital that the Commission mentions the financial crisis. This illustrates that the two elements that were identified in section 7.6.2 (i.e. the financial crisis and the systemic importance) are interrelated. The approach of the Commission actually amounts to the following: in a financial crisis, almost every bank has systemic relevance (in the sense that its failure would create a serious disturbance in the economy).[91]

7.6.4 Decisions taken before the adoption of the 2008 Banking Communication

Several bank State aid decisions were taken before the introduction of the Crisis Framework: Roskilde Bank (31 July 2008), Northern Rock (5 December 2007), West LB (30 April 2008), Sachsen LB (4 June 2008), Bradford&Bingley (1 October 2008) and IKB (21 October 2008). Since these decisions were taken before the Commission accepted Article 87(3)(b) EC as legal basis, the compatibility of the aid measures was assessed on the basis of Article 87(3)(c) EC.[92] Interestingly, in these decisions, the Commission analysed whether Article 87(3)(b) EC could be used as legal basis. It concluded, however, that this was not possible. For instance, in the Opening decision on WestLB of 30 April 2008, the Commission held that it had found no grounds for compatibility of the measures on the basis of Article 87(3)(b) EC.

Interestingly, the Restructuring decision in the case of WestLB was taken on 12 May 2009, i.e. after the introduction of the Crisis Framework. Consequently, the legal basis was Article 87(3)(b) instead of (c). The Commission justified this change as follows:

> "In the opening decision the Commission declared that Article 87(3)(c) EC is the legal basis for the compatibility assessment of the aid measure in question. The Commission also analysed whether the aid measure should

90. Amagerbanken, SA.32634, 6 June 2011, para. 48. This recital is reiterated in Amagerbanken, SA.33485, 25 January 2012, para. 98.
91. In the literature, this view is supported by, inter alia: Psaroudakis (2012, p. 210). Avgoules et al. (2013, p. 212) argue that "the failure of a bank in normal times may well be possible without systemic ramifications (for example, Barings in 1995), while the failure of the same bank in times of stress may generate large systemic effects."
92. The few bank State aid cases before the outbreak of the financial crisis were also taken on the basis of Art. 87(3)(c) EC. See, for instance, the decision on Credit Lyonnais of 20 May 1998.

> also be assessed on the basis of Article 87(3)(b) EC. Art. 87(3)(b) EC provides that aid to remedy serious disturbance in the economy of a Member State may be considered to be compatible with the common market. The Commission pointed out that at the time when the aid measure to WestLB was granted the crisis on the subprime market had not yet lead to a serious disturbance in the German economy in the meaning of Article 87(3)(b). Furthermore the Commission had not received evidence from the German authorities demonstrating that not granting aid to WestLB would have led to such serious disturbance.
>
> In the meantime the Commission has acknowledged in its three Communications and in its approval of the German Rescue package *that there is a threat of serious disturbance* in the German economy and that measures supporting banks are apt to remedy serious disturbance in the German economy. Therefore the legal basis for the assessment of the aid measure should be Article 87(3)(b) EC."

Does this change of approach violate the principle of equal treatment? It can be argued that cases before the adoption of the Banking Communication and cases after the adoption of the Banking Communication are treated differently by the Commission. However, as discussed in section 6.7.2, I take the view that the principle of equal treatment does not preclude the possibility of a policy change, provided that this policy change is justified and explained. In that regard, it should be recalled that in the 2008 Banking Communication, the Commission justified its choice for Article 87(3)(b) EC as legal basis. Moreover, the abovementioned recital from the decision on WestLB illustrates that the Commission took some effort in explaining the policy change. For these reasons, I am of the opinion that the change of legal basis does not amount to an inconsistency.

7.6.5 Concluding remarks

It should be noted that the Crisis Communications do not explicitly mention 'systemic importance' as an assessment criterion. Rather, the assessment criterion is 'serious disturbance in the economy'. Nevertheless, the Commission usually assesses the systemic importance of the bank, so the systemic importance is at least implicitly used as an assessment criterion. This is not surprising, since only banks with systemic importance can create a serious disturbance in the economy. However, since the Commission takes the view that in the situation of a financial crisis, every bank that collapses can create a serious disturbance, every bank is considered to have systemic importance. Consequently, the (implicit) assessment criterion ‘systemic importance’ is always met. This means that although the fact that the bank is systemically important is a relevant characteristic, it is not a distinguishing characteristic.[93]

7.7 Conclusion

This chapter discussed the preliminary steps in the Commission’s assessment of bank State aid cases. As set out in Part I of this chapter, the first step is to establish whether the measure constitutes State aid. As set out in Part II of this chapter, the second step is to establish whether the compatibility of the aid measure has to be assessed on the basis of Article 107(3)(b) TFEU. The essential criterion in that respect is the systemic importance of the bank.

After taking the preliminary steps, the Commission proceeds with the compatibility-assessment. The first stage of the compatibility-assessment concerns the appropriateness, necessity and proportionality of the aid measure. When is a State aid measure appropriate, necessary and proportionate and which characteristics of the case are relevant to that assessment? This question will be addressed in the next chapter.

93. In the context of this PhD-study, the main question is: has the Commission *consistently* applied this relevant characteristic? This question will be addressed in section 8.2.2.

Chapter 8. Appropriate, necessary and proportionate

8.1 Introduction

The concepts of "appropriateness", "necessity" and "proportionality" are of crucial importance. Indeed, the Commission only approves State aid measures when they are appropriate, necessary and proportionate. These criteria are cumulative, so an aid measure has to fulfil all three criteria in order for it to be approved. When is a State aid measure appropriate, necessary and proportionate and which characteristics of the case are relevant to that assessment? This question will be addressed in the present chapter.

8.1.1 Assessment in two stages

The majority of the bank State aid cases are characterised by a two-stage compatibility-assessment. As will be explained in the following subsection, this changed with the adoption of the 2013 Banking Communication. However, since most cases were assessed under the Crisis Communications before the adoption of the 2013 Banking Communication, this chapter takes the two-stage compatibility-assessment as a starting point.[1]

The two-stage compatibility-assessment entailed the following. First, the Commission would assess whether the aid was appropriate, necessary and proportionate. State aid could only be declared compatible with the common market if the aid was appropriate, necessary and proportionate.[2] The conclusion that the

1. The tables in Annex IV provide an overview of the compatibility-assessment and indicate in which instances the compatibility-assessment comprises two stages.
2. The first mention of "appropriateness, necessity and proportionality" can be found in the decision on the Danish guarantee scheme of 10 October 2008 (i.e. a few days before the adoption of the 2008 Banking Communication). In that decision, the Commission held the following: "Although there is no established practice as to the conditions for compatibility of aid granted under Article 87 (3) b) EC, it must be stressed that in order for such aid to be compatible, any aid or aid scheme must comply with general criteria for compatibility under Article 87 (3) EC, viewed in the light of the general objectives of the Treaty and in particular Article 4 (2) EC, which imply compliance with the following conditions: appropriateness, necessity and proportionality." (para. 41). These three criteria also appear – though not in the exact same words – in point 15 of the 2008 Banking Communication.

State aid was appropriate, necessary and proportionate would result in the *temporary* approval of the aid. The *final* approval was dependent on whether the restructuring plan met the three restructuring objectives (viability, burden-sharing and competition distortions). So the assessment takes two stages, which can be described in the following manner: the first stage of the assessment mainly concerns the *aid*, while the second stage of the assessment mainly concerns the *restructuring plan*. This chapter focusses on the first stage; i.e. the assessment of whether the aid is appropriate, necessary and proportionate.

8.1.2 Impact of the 2013 Banking Communication

One of the most important changes introduced in the 2013 Banking Communication concerns the procedure of the compatibility-assessment. Under the 2008 Banking Communication, recapitalisation measures and asset relief measures were temporarily approved as rescue aid, while the in-depth analysis of the aid measures was postponed to the restructuring stage. In the 2013 Banking Communication, the Commission departed from this approach. Under these new rules, the Commission will authorise recapitalisation measures and asset relief measures as restructuring aid only after an agreement on the restructuring plan has been reached.[3] With respect to these aid measures, the Commission thus starts immediately with the second stage of the compatibility-assessment. In other words: the two-stage compatibility-assessment has been abandoned for a one-stage compatibility-assessment. There is, however, one exception: point 50 of the 2013 Banking Communication provides for the possibility to grant rescue aid in the form of recapitalisation and impaired asset measures.[4] This means that in exceptional circumstances, recapitalisation and impaired asset measures can be authorised as rescue aid before a restructuring plan is approved. In such cases, there is thus still a two-stage compatibility-assessment.

8.1.3 Where can the two stages of the compatibility-assessment be found?

In principle, the pattern is as follows: the first stage of the assessment can be found in the Rescue Decision, whereas the second stage of the assessment can be found in the Restructuring Decision.[5]

3. NB: these new rules apply only to *recapitalisation and impaired asset measures*. With respect to *guarantees and liquidity support*, the two-stage compatibility-assessment continues to apply.
4. The case of Abanka (SA.37690, 18 December 2013) is a nice illustration of points 50-53 of the 2013 Banking Communication.
5. Section 3.6.1 discussed the different types of bank State aid decisions, such as Rescue Decisions and Restructuring Decisions.

However, deviations from this pattern are possible. In that regard, it should be recalled that aid can be granted as *ad hoc aid* or under a *bank support scheme*. The compatibility of bank support schemes is assessed by the Commission in a decision. In these decisions, the Commission assesses whether the scheme is appropriate, necessary and proportionate. This corresponds to the first stage of the compatibility-assessment. State aid granted under an approved bank support scheme does not have to be assessed again: since the scheme is approved, the State aid is already considered to be appropriate, necessary and proportionate.[6]

Banks that benefited from aid under a bank support scheme did not always have to submit a restructuring plan. In these cases, the compatibility-assessment only comprised one stage: i.e. the assessment of the appropriateness, necessity and proportionality of the aid. This assessment took place in the decision in which the support scheme was approved; there is no separate Rescue Decision for the beneficiary bank.[7]

In some instances, banks that benefited from State aid under a scheme had to submit a restructuring plan.[8] In these cases, the Commission adopted a Restructuring Decision (in which it assessed the compatibility of the aid, taking into account the restructuring plan; i.e. the second stage of the compatibility-assessment). Thus, in some cases, there is only a Restructuring Decision and not a Rescue Decision.[9]

Sometimes, the picture is more complicated. This is the case when the beneficiary bank has benefited from several aid measures. For instance, Banco Mare Nostrum (BMN) had received guarantees on bonds issued under the guarantee scheme ("measure A") and it was recapitalised under the FROB recapitalisation scheme ("measure B"). These FROB I preference shares were converted into normal equity ("measure C"). In 2012, BMN was again recapitalised ("measure D"). In addition, BMN benefited from an asset relief measure ("measure E"). For all these aid measure, it had to be assessed whether they were compatible with the internal market on the basis of Article 107(3)(b) TFEU. This assessment did not take place in the same decision. This is illustrated by the following recital from the Restructuring Decision on BMN:

6. It should be noted that when the Commission authorises a bank support scheme, this authorisation is restricted to six months and any extension of the scheme must be notified to the Commission. Also any amendment to the scheme must be notified to the Commission.
7. For instance in the cases of the French banks.
8. The requirement to submit a restructuring plan is discussed in-depth in section 10.2.
9. For instance the cases of Commerzbank, BCP and BPI. Also in the case of Dunfermline, there is only a Restructuring Decision. This is because – as the Commission noted in para. 59 of the decision – the measures taken in this case combined a direct restructuring of part of Dunfermline's business (through a transfer of the Transfer Package) and a liquidation of the remaining part, rather than a rescue measure which is later followed by a restructuring.

> "BMN has benefitted and will continue to benefit from aid measures granted under a scheme (measures A and B) which have already been found compatible by the Commission. BMN will further benefit from several State aid measures whose compatibility has not been previously assessed by the Commission, namely measures C, D and E".[10]

It should be noted that additional State aid that is granted before the Commission has adopted a Restructuring Decision, has to be notified individually. However, this additional State aid is not subject of a separate decision. Rather, it is taken into account in the Commission's final decision on the bank.[11]

In the Restructuring Decision on BMN, all the measures (A-E) were examined as restructuring aid under the Restructuring Communication, in light of the restructuring plan. This concerns the second stage of the compatibility-assessment. Also in this decision, the Commission conducted an assessment of the appropriateness, necessity and proportionality of measures C, D and E; i.e. the first stage of the compatibility-assessment. So with respect to measures A and B, the two stages of the compatibility-assessment are in separate decisions, while with respect to measures C, D and E, the two stages of the compatibility-assessment are both in the same decision. This illustrates that a Restructuring Decision can also include the first stage of the compatibility-assessment.

8.1.4 The relative importance of the two stages of the assessment

As explained above, the compatibility-assessment used to comprise two stages. In the first stage, the Commission was quite lenient: in none of the cases, the Commission concluded that the State aid was not appropriate, necessary or proportionate. In the literature, it has been remarked that "the EU largely rubber-stamped almost all of the interventions made by Member States to support their domestic banking industries".[12]

By contrast, in the second stage of the assessment (when the Commission assesses the restructuring plan), the approach of the Commission can be characterised as strict: in all cases, remedies were required. Thus, the Commission could afford to be lenient in the first stage, because the Commission took into account that it would be strict in the second stage.

10. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 98.
11. See, for instance: Greek bank support scheme (prolongation), N260/2010, 30 June 2010, para. 34-35. See also point 16 of the Restructuring Communication.
12. Marsden & Kokkoris 2010, p. 875. See also Winckler & Laprevote 2009, p. 13: "In practice, despite the great diversity of measures, the appropriateness of a measures has rarely, if ever, been contested by the Commission to date."

As a consequence, the second stage of the compatibility-assessment is much more important than the first stage. This is reflected by the fact that this PhD-study contains three chapters that are devoted to the second stage of the assessment (i.e. chapters 11, 12 and 13), and only one chapter devoted to the first stage of the assessment (i.e. the present chapter).

8.1.5 Scope of this chapter

Chapter 3 introduced the three main types of State aid measures: recapitalisation measures, guarantee measures and asset relief measures. The compatibility of asset relief measures is based on a very specific assessment framework: the Impaired Assets Communication (IAC). For this reason, the compatibility of asset relief measures will be discussed in the following chapter, while the current chapter focusses on the compatibility of recapitalisation measures and guarantee measures.

Part I: Appropriateness

The first of the three compatibility-criteria is the criterion that the aid should be appropriate. When is aid "appropriate"? Appropriateness is defined as follows:

> "The aid has to be well-targeted in order to be able to effectively achieve the objective of remedying a serious disturbance in the economy. This would not be the case if the disturbance would also disappear in the absence of the measure or if the measure is not appropriate to remedy the disturbance."

This definition figures in every decision in which the appropriateness of the State aid is assessed. A central element in the definition of appropriateness is 'a serious disturbance in the economy'. This element was also relevant in the context of the choice of legal basis for the compatibility-assessment. As was explained in the previous chapter, this element relates to the fact *that the bank has systemic importance*. Moreover, the aid measures should *restore market confidence*. These relevant characteristics will be discussed in sections 8.2 and 8.3.

Furthermore, it should be recalled that State aid can be granted ad hoc or under a bank support scheme. In the latter case, the assessment of the appropriateness of the aid takes place in the decision in which the bank support scheme is approved. For the interpretation of "appropriateness", it does not matter if the State aid is granted under the scheme or as individual aid. However, in case of a scheme, there is a factor that is taken into account by the Commission: the *eligibility to the scheme*, which will be discussed in section 8.10.

8.2 Systemic importance

* *The fact that the beneficiary bank has systemic importance.*

8.2.1 Why is this a relevant characteristic?

In some decisions[13], the systemic importance of the beneficiary bank is mentioned in the context of the appropriateness of the aid measure. The mentioning of the systemic importance of the bank makes sense: the aid measure should be appropriate, not (only) to rescue to the bank, but also to rescue the banking sector. Indeed, the appropriateness-criterion requires that the aid should achieve the objective of remedying a serious disturbance in the economy.

It should be noted that not every decision mentions this serious disturbance in the economy or the systemic importance of the bank in the compatibility-assessment. This not-mentioning is not problematic, because if the systemic importance of the bank was already established when the legal basis for the compatibility assessment was chosen, then there is no need to reiterate that the bank has systemic importance. However, the fact that some decisions mention the systemic importance of the bank in the compatibility-assessment while other decisions do not, creates a somewhat chaotic impression.

8.2.2 Concluding remarks

In the context of this PhD-study, the main question is: has the Commission *consistently* applied this relevant characteristic? The answer to this question depends on the view that one takes on the systemic relevance of banks. If one takes the view that all banks have systemic relevance, then the observation that the Commission has consistently held that the beneficiary bank has systemic relevance, means that there is no inconsistency. By contrast, if one takes the view that some banks are systemically important while others are not, then the approach of the Commission amounts to an inconsistency.

In the literature, differing viewpoints can be found. For instance, Waldbauer criticises the Commission for attributing systemic importance to almost every European bank.[14] Gandrud & Hallerberg argue that some banks are rescued not because they are systemically important financial institutions (SIFI's), but because they are *politically* important financial institutions.[15]

13. See, for instance: Anglo Irish Bank, 14 January 2009, para. 50; Anglo Irish Bank, 26 June 2009, para. 56; Bank of Ireland, 26 March 2009, para. 60; AIB, para. 75; KBC, 18 December 2008, para. 58; Alpha Bank, 27 July 2012, para. 58; KA, 31 March 2011, para. 57; SNS REAAL, 10 December 2008, para. 50; NLB, 7 March 2011, para. 51;
14. Waldbauer 2014, p. 512-513.
15. C. Gandrud & M. Hallerberg, 'Not SIFIs but PIFIs', blog post Bruegel, March 2015.

Honohan recognises that systemic importance depends on the current market conditions. He argues that in normal times, small banks may be allowed to fail, while in times of heightened risk aversion and uncertainty, such banks may be candidate for a bailout.[16] A report to the G-20 also stresses that the assessment of systemic importance is likely to be time-varying depending on the economic environment.[17]

In that regard, it should be pointed out that the assessment whether a bank has systemic importance is not only made by the Commission. Indeed, this assessment also takes place at the national level. Member States that consider to rescue 'their' banks will usually determine whether the rescue is necessary for the stability of the financial sector. In other words: they will assess whether the failing bank has systemic importance.[18] It is only after the granting of State aid by the Member State that the Commission assesses whether the beneficiary bank has systemic importance.

8.3 Restoring market confidence

* *The fact that the aid measure strengthens the bank and restores market confidence.*

8.3.1 Appropriateness of a guarantee

The appropriateness of guarantee schemes is nicely explained by the following recital:

> "As regards appropriateness, the Commission acknowledges that the objective of the guarantee scheme is to provide safety to investors in newly issued debt of participating institutions, in order to provide sufficient liquidity to

16. Honohan 2010, p. 130.
17. Report prepared by staff of IMF, BIS and FSB, 'Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations', October 2009, p. 7.
18. This raises the following question: which banks were not considered to be systemically relevant and thus allowed to fail? It should be noted that – in contrast to the US where the Federal Deposit Insurance Corporation (FDIC) publishes a list of bank failures – there is no clear list of bank failures in the EU.
In the Netherlands, DSB Bank was not rescued by the State. In Germany, there were 3 banks that were allowed to fail: Weserbank, Noa Bank and FXdirect Bank. These three banks were mentioned in: Deo et al. 2015, p. 168. Another example of a bank that was allowed to fail was Heta Asset Resolution (a case which is 'famous' for being the first case in which a bank was put into resolution under the BRRD).In the literature, it has been pointed out that in the US much more banks were allowed to fail. For instance, in the period 2008 – July 2013, there were 494 banks that failed.

participating banks. This is a reaction to the international market-failure where even solvent banks are having difficulties getting access to liquidity. The Commission considers that such guarantee schemes should help to overcome this market failure, by establishing the conditions for the revival of the interbank lending market and financial markets more generally and regards it therefore as an appropriate means".[19]

This recital shows the main elements in the Commission's reasoning to substantiate the appropriateness of the guarantee: 'market-failure', 'safety net', 'revival of (interbank) lending market'. These elements appear in almost every decision in which the appropriateness of a guarantee (scheme) is assessed.

An interesting observation can be found in the decision on the Polish guarantee scheme. In this decision, the Commission held that *the mere existence of the scheme* already contributed to the stability of the financial markets, because it provided a safety net. So it did not matter if there were banks that actually made use of the scheme.[20]

8.3.2 Appropriateness of a recapitalisation

The Commission has held in many decisions that a recapitalisation "is in principle an appropriate means to strengthen the financial institutions and thus to restore market confidence".[21] As the Commission put it, the objective of the recapitalisation scheme is "to ensure that banks are sufficiently strongly capitalised so as to better withstand potential losses".[22]

The reasoning of the Commission can thus be summarised in a few sentences. In fact, in many decisions, the assessment of the appropriateness of a recapitalisation measure only takes a few sentences. However, there are also decisions in which some additional aspects can be found. These aspects mainly relate to the *capital requirements* and the *objectives* of the recapitalisation (scheme).

Capital requirements

An important aspect of the assessment of the appropriateness of a recapitalisation concerns the applicable *capital requirements*. In some instances, the need for a recapitalisation is caused by an increase of the capital requirements. For instance, on 18 February 2011, Spain introduced more stringent regulatory

19. Slovenian guarantee scheme, N531/2008, 12 December 2008, para. 33.
20. Polish bank support scheme, N208/2009, 25 September 2009, para. 38.
21. In addition, the Recapitalisation Communication indicates three objectives of capital injections; see point 4-6 of the Recapitalisation Communication. In the decision on Anglo/INBS (SA.32504, 29 June 2011, para. 127), the Commission explicitly referred to point 6 of the Recapitalisation Communication.
22. German bank support scheme, N512/2008, 27 October 2008, para. 48.

capital requirements for its banking sector. Pursuant to this new legislation, all banks operating in Spain had to meet a 10% capital principal solvency ratio over risk weighted assets by 30 September 2011 at the latest. [23] As a result of this new legislation, several Spanish banks required additional capital in order to meet the higher solvency levels.[24]

In its decision of 11 February 2013 on the prolongation of the Polish bank recapitalisation scheme, the Commission observed that the applicable prudential requirements had been significantly increased by the European regulators. This led to concerns about the creditworthiness of certain banks.[25] The Commission therefore concluded that a backstop mechanism by the Member State was an appropriate means to strengthen financial institutions and thus to restore market confidence.[26]

It should be pointed out that recapitalisation measures are not only taken with respect to banks that experience a capital shortfall; also banks that comply with the regulatory capital requirements are sometimes the beneficiary of a capital injection. The need for a capital injection is sometimes caused by rising *international capital market expectations* in relation to capital levels for financial institutions. In one of the decisions on Anglo Irish Bank, the Commission explicitly recognised that these expectations can make it necessary also for banks that meet the regulatory solvency ratios, to further strengthen their capital ratios.[27]

Lending to the real economy

Another aspect concerns the objectives of a recapitalisation. In the first place, a recapitalisation (scheme) is meant to provide banks with sufficient capital, so that they are able to withstand potential losses. Another objective of a recapitalisation is to ensure that banks provide sufficient lending to the real economy; to avoid a credit crunch. The Commission attaches great importance to this latter objective.[28]

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23. Novacaixagalicia (NCG) Banco, SA.38143, 20 June 2014, para. 15-16.
24. For instance, NCG required EUR 2.622 million of additional capital. See: Novacaixagalicia (NCG) Banco, SA.33734, 28 November 2012, para. 15.
25. Polish recapitalisation scheme (prolongation), SA.35943, 11 February 2013, para. 16. This recital also figures in other decisions. See, for instance: Lithuanian bank support scheme (prolongation), SA.36047, 22 February 2013, para. 30.
26. Polish recapitalisation scheme (prolongation), SA.35943, 11 February 2013, para. 16.
27. Anglo Irish Bank, N9/2009, 14 January 2009, para. 42.
28. See: Austrian bank support scheme, 557/2008, 9 December 2008, para. 85-86.

Most bank support schemes include a requirement for the beneficiary banks to continue lending to the real economy.[29] For instance, the objective of the Danish recapitalisation scheme was "to stimulate the supply of credit to viable and healthy undertakings and households by increasing the capital and the solvency of credit institutions in Denmark and thus enhancing their possibility to offer finance to the real economy".[30]

With respect to the requirement to continue lending to the real economy, three remarks are in order. Firstly, what is the added value of this requirement? Does the requirement to continue lending to the real economy change the behaviour of banks? Or would they also have continued lending without the obligation to do so (in exchange for State aid)?

Secondly, the requirement to continue lending to the real economy is a useful way to avoid a credit crunch to the real economy. It should, however, be kept in mind that excessive lending is not beneficial to society.[31]

Thirdly, the beneficiary bank is usually required to reduce its activities ("downsizing"). There is some tension between the requirement to continue lending to the real economy and the downsizing-requirement.[32]

8.3.3 Concluding remarks

In some decisions, the Commission referred to earlier decisions in order to underline that its decisional practice is consistent. Consider, for instance, the following recital.

> "*The Commission has already observed in several cases* that recapitalisation is in principle an appropriate mean to strengthen the banks and thus to restore market confidence".[33]

The approach of the Commission with respect to the current relevant characteristic can thus be considered consistent. However, it should be recalled that the fact that a capital injection is an appropriate means to strengthen the bank, is to a very large extent self-explanatory. It would have been very hard for the Commission to be inconsistent (by claiming that a capital injection would not be suitable to strengthen the bank). This illustrates that the Commission easily arrives at the conclusion that the aid measure is appropriate.

29. See also: Ayadi, De Groen & Thyri 2015.
30. Danish bank support scheme (amendment), N31a/2009, para. 4.
31. Admati et al. 2011, p. 44.
32. This was also observed by Winckler & Laprevote (2009, p. 14) and by Adler, Kavanagh & Ugryumov (2010, p. 69).
33. Hungarian bank support scheme, N664/2008, 12 February 2009, para. 46.

Part II: Necessity

The second of the three compatibility-criteria is the criterion that the aid should be necessary. When is aid "necessary"? Necessity is defined as follows:

> "The aid measure must, in its amount and form, be necessary to achieve the objective. That implies that it must be of the minimum amount necessary to reach the objective, and take the form most appropriate to remedy the disturbance. In other words, if a lesser amount of aid or a measure in a less distortive form were sufficient to remedy a serious disturbance in the entire economy, the measure in question would not be necessary".[34]

The necessity of ad hoc guarantees and ad hoc recapitalisation measures will be discussed in sections 8.4 and 8.5. In case of a bank support scheme – which can be a guarantee scheme, recapitalisation scheme or any other scheme – there is an additional relevant characteristic: the fact that the bank support scheme has a *maximum budget*. This will be discussed in section 8.10.

8.4 Material and temporal scope of the guarantee

* *The fact that the guarantee (scheme) is limited in time and scope.*

8.4.1 Material scope of the guarantee

The (material) scope of the guarantee concerns the question which securities are covered by the guarantee. As a general principle, the scope of the guarantee should be *limited to the form of financing that is experiencing the greatest problems at that moment*.

Existing debt versus newly issued debt

As a general rule, the Commission notes positively that existing debt is not covered but only newly issued debt.[35] However, there are some guarantee schemes under which a guarantee for existing debt is possible. The Latvian guarantee scheme is such a scheme. However, the decision points out that the Latvian State will only guarantee existing debt in exceptional cases; for instance, when a government guarantee is needed to avoid the bank's immediate bankruptcy.[36] The scheme contained the commitment that banks whose existing liabilities were guaranteed, have to present a restructuring plan.[37]

34. See also the definition in: Kommunalkredit Austria (KA), SA.32745, 31 March 2011, para. 58.
35. See, for instance: UK bank support scheme, N507/2008, 13 October 2008, para. 59.
36. Latvian guarantee scheme, N638/2008, 22 December 2008, para. 10 and 40.
37. Latvian guarantee scheme, N638/2008, 22 December 2008, para. 21.

Subordinated debt

As a general rule, the Commission notes positively that subordinated debt is excluded from the scope of the guarantee scheme.[38] However, there are exceptions, as is illustrated by the Irish guarantee scheme. This scheme also included subordinated debt (Lower Tier-2).[39] The Commission observed that the extended scope of the Irish scheme made Ireland an exception (compared to the guarantee schemes of the other Member States).[40] In the decision on the scheme, the Commission held that although the inclusion of subordinated debt was remarkable, it was nonetheless justified.[41] Firstly, the inclusion was *necessary* to ensure revolving of existing subordinated debt. Secondly, the scheme introduced a *safeguard* to mitigate the concerns that the inclusion of subordinated debt could raise. This safeguard consisted of the requirement that banks benefiting from the guarantee on subordinated debt had to maintain at least the solvency ratio initially obtained when this financing took place during the whole duration of the guarantee period.

Covered bonds

There are three guarantee schemes that included covered bonds: the Finnish, German and Swedish scheme.[42] The Commission did not consider this to be problematic, because of the following reasons. In the first place, a premium was charged. The Commission took the view that the level of remuneration would ensure that the guarantee would only exceptionally be called for covered bonds.[43] In the second place, the covered bonds were an integral part of the Swedish financial system and the Danish experience had shown that the exclusion of covered bonds form the guarantee would lead to the drying up of the market.

8.4.2 Temporal scope of the guarantee

The principle that the aid should be limited to the minimum necessary requires that the guarantee should be limited in time. The temporal scope of the guarantee can concern two aspects: the maturity/duration of the guarantee and the time window of the guarantee scheme (issuance period).

38. See, for instance: UK bank support scheme, N507/2008, 13 October 2008, para. 59.
39. Irish guarantee scheme, NN48/2008, 13 October 2008, para. 17.
40. Commission Staff Working Paper 2011, p. 48.
41. Irish guarantee scheme, NN48/2008, 13 October 2008, para. 64.
42. Swedish bank support scheme, N533/2008, 29 October 2008, para. 42; Finnish guarantee scheme, N567/2008, 13 November 2008, para. 23 and 38.
43. German bank support scheme, N625/2008, 12 December 2008, para. 75.

Time window of the scheme/issuance period

With respect to the UK Guarantee scheme, the Commission noted positively that the scheme had a short issuance period (i.e. six months instead of two years).[44] A time window of six months means that banks have only a window of six months to issue the new debt that would benefit from the guarantee. As a result of this short issuance period, the overall amount of debt covered is lower than if the guarantee would be given for newly issued debt over a two year period. The temporal scope is thus limited.

Maturity/duration

The duration of the guarantee should be as short as possible. In principle, this should be 3 years. Nevertheless, in justified exceptional cases, the guarantee may apply for five years. However, this may occur only up to a certain amount (up to one third of the debts of the bank). This precondition is also reprised in point 59(b) of the 2013 Banking Communication. In addition, the six-monthly reports must include an update on the granting of such guarantees and the justification in each case.[45]

In some decisions, some specific elements can be found. For instance, in the decision on the Hungarian guarantee scheme, it was noted that in the Hungarian market, funding to finance housing loans is an important part of the market. Since the duration of these loans usually exceeds 3 years, the Commission considered that it was justified that part of the guarantee budget could be used to cover loans of between 3 and 5 years duration.[46]

Another element can be found in the decision on the Swedish scheme. Under the Swedish guarantee scheme, *covered bonds* were guaranteed for a period for up to 5 years. This exceptional duration was justified by the fact that covered bonds were an integral part of the Swedish financial system.[47]

8.4.3 Concluding remarks

The present section has shown that the Commission consistently assessed whether the guarantee was limited in time and scope. For instance, in most cases, the Commission welcomed the fact that the guarantee did not include existing debt (but only newly issued debt). In the cases where the guarantee did cover existing debt, the Commission noted that the extended scope of the guarantee was justified. Thus, in either case, the relevant characteristic was taken into account by the Commission.

44. UK bank support scheme, N507/2008, 13 October 2008, para. 60.
45. Polish guarantee scheme, N208/2009, 25 September 2009, para. 44.
46. Hungarian bank support scheme, N664/2008, 12 February 2009, para. 60.
47. Swedish bank support scheme, N533/2008, 29 October 2008, para. 44.

8.5 Necessity of recapitalisation measures

'Necessity' means that the aid amount should be limited to the minimum necessary; the aid amount should not be more than is needed to achieve the objective of the aid measure. The necessity of the measure is thus closely linked to the objective of the measure. In that regard, it should be recalled that the objective of a recapitalisation is usually to ensure that the bank *complies with the regulatory capital requirements*.

Thus, the amount of the capital injection should be limited to what is necessary to ensure that the bank fulfils its regulatory capital requirements. For instance, in the Rescue Decision on Monte dei Paschi di Siena (MPS), the Commission considered that the aid was limited to covering MPS immediate capital needs, catering also for further foreseeable risk factors which could endanger compliance with EBA minimum capital ratios.[48]

The Commission finds the aid to be limited to the minimum necessary when the aid amount is derived from the calculation of the specific capital needs of the bank.[49] It should, however, be noted that the Commission *does not assess whether the capital needs of the bank are correctly calculated*. The Commission essentially limits itself to the observation that the aid amount will ensure that the bank will again fulfil its regulatory capital requirements.

Thus, the Commission does not usually dwell on the exact amount of aid needed to cover the bank's capital needs. Nevertheless, in a few cases, the Commission referred to the fact that the financial supervisor had determined the amount of State aid needed.[50]

The analysis of the bank State aid decisions reveals that the Commission never concludes that the aid amount is not limited to the minimum necessary. Just as the Commission always accepts a recapitalisation as an appropriate measure (see subsection 8.3.3), a recapitalisation is always accepted as a necessary measure. It is worth stressing that this does not mean that Member States can just grant large amounts of aid. Indeed, the amount of aid has repercussions for the extent of restructuring required (as will be explained in section 10.3).

48. Monte dei Paschi di Siena (MPS), SA.35137, 17 December 2012, para. 37.
49. See, for instance: Caixa Geral de Depositos (CGD), SA.35062, 18 July 2012, para. 50.
50. For instance, in its assessment of the necessity of the State aid to NKBM, the Commission held as follows: "The Commission recognises the need for the recapitalisation in favour of NKBM. The letters from the Bank of Slovenia endorse that necessity. In particular, the Bank of Slovenia states that currently the level of the CT1 is insufficient for the Bank to meet regulatory requirements from the end of 2012 and that NKBM is a systemically important bank for Slovenia." See: Nova Kreditna Banka Maribor (NKBM), SA.35709, 20 December 2012, para. 37.

Part III: Proportionality

After establishing that the aid is appropriate and necessary, the Commission proceeds to the third compatibility-criterion, according to which the aid should be proportionate. When is aid "proportionate"? Proportionality is defined as follows:

> "The positive effects of the measures must be properly balanced against the distortions of competition, in order for the distortions to be limited to the minimum necessary to reach the measures' objectives. This follows from Article 3(1)(g) EC and Article 4(1) and (2) EC, which provide that the Community shall ensure the proper functioning of an internal market with free competition."

State aid measures are usually considered to be proportionate if three elements are present: in the first place, there should be an *adequate remuneration* (see section 8.6), in the second place, there should be *exit incentives* (see section 8.7), in the third place, there should be *behavioural safeguards* in place (see section 8.8).

8.6 Adequate remuneration

* *The fact that the beneficiary bank pays an adequate remuneration to the State.*

8.6.1 Why is this a relevant characteristic?

Beneficiary bank do not receive State aid for free: in return for the State aid, the bank has to pay a remuneration to the State. For instance, when the bank is recapitalised by the State, the bank has to pay interests or dividends to the State. Similarly, when a bank benefits from a State guarantee, it has to pay a guarantee fee to the State.

The remuneration of State aid is a key element of the compatibility-assessment.[51] This is illustrated by the following recital, which can be found in several decisions:

51. It should be noted that an adequate remuneration is also important in the context of the assessment of burden-sharing and own contribution, since the remuneration (that the beneficiary bank pays to the State) constitutes an own contribution by the beneficiary bank.

> "As regards proportionality, the distortions of competition is minimised by various safeguards. Above all, the aid amount is minimised through market orientated premiums".[52]

In essence, the remuneration should be adequate. The fact that the beneficiary bank pays an adequate remuneration to the State is thus a relevant characteristic.

8.6.2 *Pricing of guarantees*

The Commission has provided guidance in the form of pricing principles. Initially, these pricing principles were based on the Recommendations of 20 October 2008 of the Governing Council of the European Central Bank. The pricing principles were updated twice: by the DG Competition Staff Working Document (30 April 2010)[53] and by the Second Prolongation Communication.

The pricing principles

The ECB Recommendations of 20 October 2008 made a distinction between guarantees on bank debt with maturities exceeding 1 year, and guarantees on bank debt with maturities of less than or equal to 1 year. In the latter case, the pricing should be based on an overall flat fee of 50 basis points. The pricing formula of guarantees on bank debt with a maturity exceeding 1 year, was more complicated. It comprised two elements: the pricing should be based on i) the bank's CDS spread[54], and ii) an add-on fee (of 50 basis points).

A bank's CDS spread is a good measure of the (credit-)risk profile of a bank.[55] Sometimes, there are no CDS data (or no representative CDS data). However, if the bank has a credit rating, then the CDS spread can be derived from the CDS spreads of banks with the same credit rating.

In April 2010, the pricing principles were updated by the DG Competition Staff Working Document.[56] Although the financial markets had not yet returned to entirely normal functioning, the Commission observed a "gradual stabilisation

52. Polish bank support scheme, para. 45; Greek bank support scheme, para. 70; Slovenian guarantee scheme, para. 37; UK bank support scheme, para. 61;
53. DG Competition Staff Working Document of 30 April 2010 on the application of State aid rules to government guarantee schemes covering bank debt to be issued after 30 June 2010.
54. The bank's median five-year senior debt CDS spread observed in the period 1 January to 31 August 2008.
55. This view is not shared by everyone. For instance, the Turner Review (p. 109) argues that CDS spreads are poor indicators of risk.
56. Another important feature of this DG Competition Staff Working Document is that it introduced a requirement to submit a viability plan when certain thresholds (of total outstanding guaranteed liabilities) are exceeded. This will be discussed in detail in section 10.2.3.

of the market situation" which led to a reduction of the risk premium for unguaranteed bank debt.[57] As a result, sound banks chose to attract funding on the financial market without using the government guarantee. The DG Competition Staff Working Document of 30 April 2010 therefore provided for an increase of the guarantee fee by 20-40 basis points.[58]

A second update of the pricing principles took place by the adoption of the Second Prolongation Communication in December 2011. Thus far, the guarantee fees were based on the banks' CDS spreads, because those CDS spreads were thought to reflect the risk profile of the individual banks. However, the Commission noticed that the banks' CDS spreads were not only influenced by bank-specific factors, but that those spreads were also affected by the growing tensions in sovereign debt markets.[59] In addition, there was an overall increase in the perception of risk in the banking sector as a whole. The pricing formula was therefore updated "to isolate the intrinsic risk of individual banks from changes in CDS spreads of Member States and of the market as a whole".[60]

The decisional practice

Most guarantee schemes provided for a guarantee fee that was in line with the ECB recommendations of 20 October 2008. If the fee was in line with the ECB recommendations, the Commission considered the remuneration to be appropriate.[61]

In 'duly justified cases' a lower remuneration can be accepted. The case of Anglo Irish Bank and Irish Nationwide Building Society (INBS) is such a 'duly justified case'. Anglo and INBS were merged. The merged entity essentially was a resolution vehicle which facilitated the orderly resolution of Anglo and INBS. The merged entity would not carry out any economic activities besides those necessary to work out the loan book. The Commission further noted that Anglo and INBS would both disappear from the Irish lending and deposit markets. These circumstances justified that the merged entity did not pay a fee for the guarantee.[62]

57. DG Competition Staff Working Document, para. 24.
58. By 20 basis points for banks with a rating of A+ or A, by 30 basis points for banks with a rating of A-, by 40 basis points for banks with a rating below A-. In June 2011, another DG Competition Staff Working Document was published. In this document, it was concluded that "with the price increase in May 2010 the right incentives were set in order to trigger an exit from the reliance on State guarantees" and that a further price increase would not be necessary.
59. In that regard, Pesaresi & Mamdani (2012, p. 770) stress that the Second Prolongation Communication should be seen in the context of the sovereign debt crisis.
60. Point 17 of the Second Prolongation Communication.
61. German bank support scheme, N512/2008, 27 October 2008, para. 66.
62. Anglo/INBS, SA.32504, 29 June 2011, para. 137.

Banco Privado Portugues (BPP) had to pay a fee of 20 basis points for the guarantee. The Commission observed that this was well below the level of remuneration normally required for distressed banks. The Commission considered that the low level of remuneration was needed to keep BPP afloat. The Commission concluded the remuneration appropriate only for the rescue phase.[63] Importantly, the remuneration was subject to the submission of a restructuring plan.[64]

8.6.3 Pricing of recapitalisations

The Recapitalisation Communication stresses that closeness of pricing to market prices is the best guarantee to limit competition distortions.[65] Nevertheless, the Commission recognises that the remuneration for recapitalisations cannot be as high as the then-current market levels.[66] At the same time, the Commission stresses that the total expected return on recapitalisation to the State should not be too distant from current market prices.[67]

The ECB recommendations

With respect to the issue of remuneration, the Recapitalisation Communication refers to the ECB recommendations: on 20 November 2008, the Governing Council of the European Central Bank provided recommendations on the pricing of recapitalisations. Pursuant to the ECB recommendations, the required rate of return for fundamentally sound banks[68] could be based on a "price corridor". The price corridor consists of a lower bound and an upper bound. The lower bound is the required rate of return on subordinated debt.[69] The upper bound is the required rate of return on ordinary shares.[70] Pursuant to this

63. Banco Privado Português (BPP), C33/2009, 20 July 2010, para. 57.
64. Portugal failed to submit a restructuring plan.
65. Point 19 of the Recapitalisation Communication.
66. Point 24 of the Recapitalisation Communication.
67. Point 25 of the Recapitalisation Communication.
68. This methodology applies to fundamentally sound banks. By contrast, the remuneration for distressed banks should be higher.
69. The required rate of return on subordinated debt would be determined as the sum of the following components: i) the government bond yield of the country where the bank is domiciled; ii) the issuing bank's 5 year CDS spread on subordinated debt, where representative data is available, in order to account for the credit risk of the individual institution; iii) an add-on fee of 200 basis points per annum to cover operational costs and provide banks with adequate incentives, as well as to avoid significant discrepancies with the observed average yield on subordinated debt in the euro area.
70. The required rate of return on ordinary shares would be determined as the sum of the following components: i) the government bond yield of the country where the bank is domiciled; ii) an equity risk premium of 500 basis points per annum; iii) an add-on fee of 100 basis points per annum to cover operational costs and provide banks with adequate incentives. A lower add-on fee is considered appropriate for ordinary shares for several reasons, including the fact that they represent higher quality (core Tier-1) capital.

methodology, the minimum remuneration will amount to between 7,0% and 9,3% *on average*[71] for fundamentally sound banks, according to the bank's risk profile and the structure of the capital instrument. As such, the average price corridor represents an indicative range.[72]

Pursuant to point 28 of the Recapitalisation Communication, the Commission accepts a minimum remuneration based on this methodology. This remuneration is differentiated at the level of an individual bank on the basis of i) the type of capital chosen, ii) appropriate benchmark risk-free interest rate, iii) the individual risk profile. On top of this entry level of remuneration, Member States may include a step-up clause. This follows from point 29 of the Recapitalisation Communication; and will be discussed in section 8.7.

Many recapitalisation schemes included a remuneration methodology in line with the Recapitalisation Communication and the ECB recommendations. There were some exceptions. For instance, the Lithuanian recapitalisation scheme contained a remuneration formula that differed from the ECB formula.[73] Instead of using the bank's CDS spread, the sovereign CDS was used.[74] The Commission accepted this, because the remuneration exceeded the remuneration calculated on the basis of the ECB formula.[75] In footnote 6, it was remarked that some Lithuanian banks had a higher credit rating than the Lithuanian State.

Another interesting case is the case of the Finnish recapitalisation scheme. Under this scheme, the Finnish State subscribed to subordinated debt issued by the beneficiary banks. The interest that those banks had to pay was based on the Finnish government 5-year bond yield with an add-on of 600 basis points.[76] Two things are of importance here. Firstly, this remuneration level significantly exceeded the remuneration level set by the ECB recommendations of 2008. Secondly, the remuneration under the Finnish scheme is not based on the risk profile of the individual banks. The Commission observed that this "one size fits all" solution might – in theory – create a biased outcome in favour of the banks with a high risk profile. However, with reference to the "particular situation of Finland" the Commission found this "one size fits all" solution to be

71. The percentages of 7,0% and 9,3% are calculated by using average (mean or median) values of the relevant parameters (government bond yields, CDS spreads, equity risk premia). See point 27 of the Recapitalisation Communication and points 3 and 4 of the ECB recommendations.
72. Point 27 of the Recapitalisation Communication.
73. The interest rate that Lithuania charged, consisted of the sum of i) the yield of comparable government bonds, ii) Lithuania 5 year CDS, and iii) an add-on fee of 200 basis points.
74. Lithuanian bank support scheme, N200/2009 and N47/2010, 5 August 2010, para. 30-31, 102-104.
75. Lithuanian bank support scheme, N200/2009 and N47/2010, 5 August 2010, para. 104.
76. Finnish recapitalisation scheme, N329/2009, 11 September 2009, para. 9.

justified. The Finnish banking sector is characterised by a relative homogeneity of the prudential situation of the banks. There is no bank with a regulatory capital ratio below 8,5%, so the overall level of capitalisation of the Finnish banks is relatively high.

The cases of the Lithuanian recapitalisation scheme and Finnish recapitalisation scheme illustrate that the Commission accepts alternative pricing methodologies, provided that they lead to a higher remuneration than the methodology based on the ECB recommendations.[77]

Specific guidance on variable remuneration

In the Second Prolongation Communication, the Commission gave some further guidance, in particular with respect to capital instruments bearing a *variable remuneration*. Thus far, the Commission guidance mainly applied to capital instruments bearing a *fixed remuneration*.[78] Point 8 of the Prolongation Communication requires that the new shares should be subscribed at a discount to the market price.[79] With respect to hybrid instruments, the Second Prolongation Communication introduced an "alternative coupon satisfaction mechanism".[80] This mechanism requires that coupons which cannot be paid out in cash would be paid to the State in the form of newly issued shares.[81]

Pursuant to the guidance provided in the Second Prolongation Communication, the new Spanish recapitalisation scheme provided that the entry price for the recapitalisation via ordinary shares would be based upon a discount, of at least 25%, on the market or economic value of the beneficiary bank. The dilution effects, due to the recapitalisation of the FROB, would be taken into consideration before that discount is computed.[82] As the Commission noted in its decision on NordLB, "an acceptable discount in its recent decisional practice has been identified to be 25%".[83] A sufficient discount is a form of an ex-ante remuneration of the capital injection.[84]

77. This is also recognised in point 30 of the Recapitalisation Communication.
78. See also: Pesaresi & Mamdani 2012.
79. As Lienemeyer, Kerle & Malikova (2014, p. 277) put it, the Second Prolongation Communication brought an end to the situation in which some Member States avoided diluting ordinary shareholders by paying too high a price per share.
80. Point 13 of the Second Prolongation Communication.
81. Point 13 of the Second Prolongation Communication.
82. Spanish (new) recapitalisation scheme, SA.35069, 25 July 2012, para. 27.
83. NordLB, SA.34381, 25 July 2012, para. 119. The Commission referred to its decision on the new Portuguese recapitalisation scheme (SA.34055, 30 May 2012).
84. NordLB, SA.34381, 25 July 2012, para. 153.

Participation of private investors

The Recapitalisation Communication stresses that closeness of pricing to market prices is the best guarantee to limit competition distortions.[85] This general principle is translated into the following criterion: if there is a significant participation of private investors (30% or more) on equal terms as the State, then the Commission considers the remuneration to be appropriate.[86] This criterion – which is laid down in point 21 of the Recapitalisation Communication – is applied in the cases of the Swedish recapitalisation scheme, the Portuguese recapitalisation scheme, the German scheme and the new Spanish recapitalisation scheme.[87]

To take the Swedish scheme as an example: under this scheme, the Swedish State would only take part in recapitalisations if there was a participation of at least 30% of private investors. Another condition was that the State and the private investors would participate on equal terms.[88] Point 21 of the Recapitalisation Communication further stresses that in case of a significant participation of private investors, there does not appear to be any need for ex ante competition safeguards or exit incentives. There is however one precondition: the terms of the deal are not such as to significantly alter the incentives of private investors. The decision on the Swedish recapitalisation scheme provides some further clarification about this precondition.[89] Firstly, the private contribution should not stem mainly from the current shareholders or other investors with a vested interest in the bank. Secondly, the remuneration should not be below the remuneration indicated as appropriate in point 26 to 30 of the Recapitalisation Communication.

The recapitalisation of Nova Ljubljanska banka (NLB) took place through a public offering of the shares. First, the existing shareholders were given the opportunity to take up the new shares (pro-rata to their shareholdings). Second, shares not taken up by the existing shareholders were offered to the open market. The Slovenian State was one of the existing shareholders (49%) and subsequently acquired 49% of the newly issued shares. In addition, the Slovenian State had committed to purchase any shares not taken up by the general public.[90] This commitment amounted to an underwriting of the capital increase

85. Point 19 of the Recapitalisation Communication.
86. Point 21 of the Recapitalisation Communication.
87. Portuguese recapitalisation scheme, N556/2008, 20 May 2009, para. 76-78; German bank support scheme, N512/2008, 27 October 2008, para. 54; Spanish (new) recapitalisation scheme, SA.35069, 25 July 2012, para. 31. The 30%-participation by private investors was also briefly mentioned in N 557/2008 – Austria, 9 December 2008, para. 28. It was specified that “territorial authorities and public undertakings within the meaning of the Transparency Directive do not rank as private investors”.
88. Swedish recapitalisation scheme, N69/2009, 10 February 2009, para. 37.
89. Swedish recapitalisation scheme, N69/2009, 10 February 2009, para. 39.
90. Nova Ljubljanska banka (NLB), SA.32261, 7 March 2011, para. 19.

of NLB. Because of the (implicit) underwriting by the Slovenian State, the Commission considered that the NLB-case was not comparable to the situation contemplated in point 21 of the Recapitalisation Communication. The Commission concluded that regardless of the outcome of the IPO, the Slovenian State cannot be said to have acted on equal terms with private investors.[91]

Compensation by far-reaching restructuring

An important (pricing) principle can be found in points 15 and 44 of the Recapitalisation Communication. Pursuant to these points, a low remuneration can be accepted on the condition that the lower remuneration will be reflected in the restructuring plan. This principle has been applied in several bank State aid cases. For instance, in the Rescue Decision on Catalunya Banc, the Commission considered that it was justified that no remuneration was paid for the recapitalisation measure provided that the absence of remuneration would be *compensated by in-depth restructuring* in the restructuring plan.[92]

A low remuneration thus has to be compensated for by far-reaching restructuring. This principle can be linked to a greater concept: the need for far-reaching restructuring. As will be discussed in-depth in chapter 10, the “need for far-reaching restructuring” is a central concept in the Commission’s State aid control policy. While there are also other factors that trigger the need for far-reaching restructuring, section 10.4 will focus specifically on the principle that a low remuneration has to be compensated for by far-reaching restructuring.[93] In the context of the current chapter, it can be concluded that the Commission has shown some flexibility by accepting a lower remuneration in several bank State aid cases.

8.6.4 Concluding remarks

It can be observed that the Commission has consistently assessed whether the remuneration was adequate. Indeed, in every case, the Commission either concluded that the remuneration was in line with the ECB recommendations or concluded that the low level of remuneration was justified and/or had to be compensated for by far-reaching restructuring.

91. Nova Ljubljanska banka (NLB), SA.32261, 7 March 2011, para. 39.
92. Catalunya Banc, SA.33103, 30 September 2011, para. 51.
93. This principle will also be touched upon in section 9.10.

8.7 Exit incentive

* *The fact that there are exit incentives.*

8.7.1 Why is this a relevant characteristic?

Two key elements in the proportionality-assessment are the fact that there is an adequate remuneration (see section 8.6) and that there are behavioural restrictions (see section 8.8). There is another key element which is on the interface of the adequate remuneration and behavioural restrictions. This key element will be discussed in the present section and concerns the exit incentive. 'Exit' means exit from reliance on State aid. There are two types of exit incentives: a step-up clause in the remuneration (see subsection 8.7.2) and behavioural constraints (see subsection 8.7.3).

8.7.2 Step-up clause

A step-up clause means that the remuneration (that the beneficiary bank has to pay to the State) *increases over time*. This is a powerful incentive for beneficiary banks to pay back the injected capital. It is therefore welcomed by the Commission.[94]

A step-up clause can be designed in several ways, as is illustrated by the following four examples:
- The Portuguese recapitalisation scheme contained a step-up clause: each year, the remuneration rate would increase by 50 basis points until the injected capital was reimbursed.[95]
- The Slovak scheme provided for an increase by 50 basis points in the fourth year after the capital injection, and by 100 basis points in the fifth year after the capital injection.[96]
- The Greek FSF recapitalisation scheme contained a special step-up clause. The preference shares were supposed to be redeemed within five years. If that five-year had lapsed and the redemption of the preference shares had not been completed, an annual cumulative surcharge of 2% was to be charged.[97]
- The Polish scheme included a step-up factor, which was calculated as $(1+2*\text{Lombard rate})^n$, where n indicated the length of the State engagement in years.[98]

94. Point 31 of the Recapitalisation Communication.
95. Portuguese recapitalisation scheme, N556/2008, 20 May 2009, para. 29 and 80. NB: this applied to recapitalisations where there was no significant participation of private investors.
96. Slovak bank support scheme, N392/2009, 8 December 2009, para. 15 and 64.
97. Recapitalisation of credit institutions in Greece under the Financial Stability Fund, N328/2010, 3 September 2009, para. 29 and 63.

The Finnish recapitalisation scheme – which was described in section 8.6.3 – did not include a step-up clause. However, the remuneration rate was very high. The Commission therefore concluded that there was no prima facie need for exit incentives.[99] The Commission went on to consider that Finland had committed to provide information on the path to exit.

Similarly, in the case of the Swedish recap scheme, the Commission concluded that there was no prima facie need for exit incentive, because – as explained in section 8.6.3 – there was a significant participation of private investors which meant that the remuneration was market-oriented.[100] This consideration is in line with point 21 of the Recapitalisation Communication which indicates that there does not appear to be any need for exit incentives, in case of a significant participation of private investors.

8.7.3 Other exit mechanisms

Several cases included a dividend ban. The Commission considered that the dividend ban was an (additional) incentive for banks to reimburse the injected capital.[101] A dividend ban is aimed at the bank's shareholders. It gives them an incentive to support or demand a reimbursement of the injected capital at the earliest opportunity.

The Portuguese recapitalisation scheme did not include a dividend ban, but it contained the clause that if a beneficiary bank decided to pay out dividends to its shareholders, the remuneration rate of the injected capital would be increased by 50 basis points.[102] The Commission concluded that this could be regarded as a further incentive to pay back capital to the State as quickly as possible.[103]

In fact, all behavioural constraints are to some extent 'painful' and make it unattractive for a bank to be dependent on State aid over a long period. Not only restrictions on dividend payments, but also restrictions on the executive remuneration policy are exit incentives. In the decision on the Polish recapitalisation scheme, the restrictions on the executive remuneration policy were

98. Polish recapitalisation scheme, N302/2009, 21 December 2009, para. 19 and 56.
99. Finnish recapitalisation, N329/2009, 11 September 2009, para. 41-42.
100. Swedish recapitalisation scheme, N69/2009, 10 February 2009, para. 42.
101. Slovak bank support scheme, N392/2009, 8 December 2009, para. 65. Greek bank support scheme, N560/2008, para. 61.
102. Portuguese recapitalisation scheme, N556/2008, 20 May 2009, para. 30.
103. Portuguese recapitalisation scheme, N556/2008, 20 May 2009, para. 80.

mentioned as exit incentives.[104] A similar observation can be found in the decision on the Lithuanian Central Credit Union (LCCU). In that case, payment of bonuses were suspended to the LCCU staff and executives *until the injected capital was repaid*.[105]

8.7.4 Concluding remarks

The Commission has consistently welcomed the fact that there are exit incentives. As discussed in the present section, the exit incentives can be designed differently. However, no matter how they are designed, they all have the effect of inducing the bank to repay the aid. In that regard, there is no inconsistency.

8.8 Behavioural constraints

* *The fact that there are behavioural constraints (in the rescue phase).*

8.8.1 Why is this a relevant characteristic?

The previous section already provided some examples of behavioural constraints, such as the dividend ban and restrictions on the executive remuneration policy. Other examples of behavioural constraints are the acquisition ban, the advertising ban and the ban on aggressive commercial practices.

The presence of behavioural commitments[106] forms a key element in the assessment of the proportionality. In the first place, behavioural constraints are relevant, because they serve as an exit incentive – as was explained in section 8.7. In the second place, behavioural constraints limit the distortions of competition. As a result of these behavioural constraints, the Commission finds the aid proportionate.

It should be pointed out that behavioural constraints are very important to the second stage of the compatibility-assessment (i.e. when the Commission assesses the restructuring plan). Many behavioural constraints apply during the entire restructuring period. However, the Commission welcomes the introduction of behavioural safeguards in the rescue phase, as is illustrated by the decision on the prolongation of the Polish bank recapitalisation scheme. In this

104. Polish recapitalisation scheme, N302/2009, 21 December 2009, para. 56.
105. LCCU, SA.34208, 26 September 2012, para. 58. NB: this consideration was part of the assessment of the burden-sharing (and not part of the proportionality-assessment).
106. As regards terminology, it should be noted that there are various terms to express the same concept. In the Commission decisions, the following terms can be found: behavioural commitments, behavioural constraints, behavioural restrictions, behavioural safeguards and behavioural measures.

decision, the Commission observed that the rescue phase can last long (sometimes as much as several years). From this perspective, it is – in the view of the Commission – important that the Member State introduces behavioural safeguards as early as possible.[107]

Bank support schemes usually include the following behavioural commitments: remuneration restrictions; coupon/dividend ban; advertising ban; balance sheet growth limitation. An overview of these behavioural constraints is provided in the table in Annex V. This table indicates for each bank support scheme which behavioural constraints are included in the scheme.

Since behavioural constraints are mainly important to the second stage of the compatibility-assessment, they will be discussed in chapters 11, 12 and 13. However, two behavioural constraints that were specifically taken into account in the assessment of the proportionality of a bank support scheme, will be discussed here; this concerns the balance sheet growth limitation (see subsection 8.8.2) and the ban on advertising (see subsection 8.8.3).

8.8.2 Balance sheet growth limitation

As is indicated in the table in Annex V, several bank support schemes included a balance sheet growth limitation. For instance, the Swedish guarantee scheme provided the following: the aggregate growth in balance sheet volume (of the banks that are participating in the guarantee scheme) may not exceed the highest of the following three percentages: i) the annual rate of growth of Swedish nominal GDP in the preceding year; ii) the average historical growth of balance sheets in the Swedish banking sector during the period 1987-2007; iii) the average growth rate of the balance sheet volumes in the banking sector in the EU in the preceding six months.[108]

In January 2009, Sweden amended the guarantee scheme. One of the amendments was to repeal the balance sheet growth limitation. Sweden argued that this behavioural constraint was an "unnecessary disincentive for eligible institutions to benefit from the guarantee".[109] The Commission accepted this amendment. In that regard, the Commission referred to footnote 4 (related to point 35) of the Recapitalisation Communication, in which the Commission recognised that balance sheet restrictions were not necessary in recapitalisation schemes of fundamentally sound banks. The same applied to guarantee schemes, unless there is a serious risk of displacement of capital flows between Member States.

107. Polish recapitalisation scheme (prolongation), SA.35943, 11 February 2013, para. 22.
108. Swedish guarantee scheme, N533/2008, 29 October 2008, para. 14.
109. Swedish guarantee scheme (amendment), N26/2009, 29 January 2009, para. 20.

Following this new guidance, all Member States that had set up schemes including a balance sheet growth limitation removed this particular behavioural constraint.[110]

8.8.3 Ban on advertising

Banks may not use State aid to expand their activities. Therefore, as a general rule, beneficiaries of State aid are prohibited from advertising referring to the State aid. This behavioural constraint can be found in many cases.

In most cases, the ban on advertising is a straightforward prohibition. There is one case, however, that contains a more nuanced restriction: one of the commitments of the Bulgarian scheme (which provided liquidity support to Bulgarian banks) was a ban on advertising. The commitment was specified as follows: "to impose a ban on advertising referring to State support by the beneficiaries of the scheme *for the purpose of acquiring new clients and businesses* and to prevent them from employing any aggressive commercial strategies which would not take place without the support of the scheme".[111] This is not a complete ban on advertising, since it is limited to advertising 'for the purpose of acquiring new clients and businesses'. The limited scope of the advertising ban was justified by the circumstances on the Bulgarian financial markets. Apparently, there was a risk of a bank run. Banks therefore needed to reassure their depositors. This particular situation justified the narrower scope of the behavioural constraint.

8.9 Restructuring plan

As explained in section 8.1.3, the appropriateness, necessity and proportionality of State aid measures are sometimes assessed in the Restructuring Decision (instead of the Rescue Decision). For instance, the Restructuring Decision on Banco Mare Nostrum included an assessment of the appropriateness, necessity and proportionality of measures C, D and E, while measures A and B were already assessed in the Rescue Decision. The fact that the proportionality of some State aid measures is assessed in the Restructuring Decision means that in its assessment of the proportionality, the Commission can take into account the restructuring plan that the Member State has submitted for the beneficiary bank. Indeed, in the Restructuring Decision on Banco Mare Nostrum, the Commission held as follows:

110. Finland, N44/2009, para. 23; Spain, N588/2009, 1 December 2009, para. 13; UK, N650/2008, para. 26;
111. Bulgarian liquidity support scheme, SA.38994, 29 June 2014.

> "The Commission considers that, in principle, the proportionality of measures C and D *should be assessed in the light of the depth of the Restructuring Plan*, taking into account measures to ensure burden-sharing and limiting distortions of competition. It therefore refers to its assessment of the measures under the Restructuring Communication below".[112]

This recital shows that the aid measures were considered proportionate *in the light of the restructuring plan*. This illustrates that there is some overlap between the (first stage) compatibility-criterion 'proportionality' and the (second stage) compatibility-criteria 'burden-sharing' and 'limiting competition distortions'. The fact that the Commission in this Restructuring Decision merely refers to the second stage of the compatibility-assessment also fits in with the observation that the main focus of the Commission is on the second stage of the compatibility-assessment (and not on the first stage).

Part IV: Other observations

8.10 Additional relevant characteristics in the context of a bank support scheme

Many Member States have set up bank support schemes. The most common schemes are recapitalisation schemes and guarantee schemes.[113] When assessing the compatibility of a bank support scheme, the Commission usually welcomes the fact that the scheme is *targeted at the appropriate beneficiaries* (see subsection 8.10.1), the fact that the scheme *is open to subsidiaries of foreign banks* (see subsection 8.10.2), and the fact that the scheme *has a maximum budget* (see subsection 8.10.3).

8.10.1 Targeted at the appropriate beneficiaries

May every bank benefit from State aid under the scheme or is the scope of the scheme limited to certain banks? This question concerns the *eligibility* for the scheme. Many guarantee schemes and some recapitalisation schemes were

112. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 107. The decision on BMN is taken as example. These recitals can also be found in decisions on several other Spanish banks, such as Catalunya Banc (para. 137-139) and Liberbank (para. 94-96). See also: BFA, para. 155 and 162. These decisions were all taken in November/December 2012 and were structured in a similar way. See also: RBS, para. 142; KA, 31 March 2011, para. 61.
113. An asset relief scheme, a bond loan scheme and a wind-down scheme are examples of other types of bank support schemes.

targeted at solvent/fundamentally sound banks. The Commission considered that those schemes were *targeted at the appropriate beneficiaries*. The fact that the scope of the bank support scheme is limited to solvent/fundamentally sound banks thus appears to be a relevant characteristic.

The following recital clearly explains the rationale of limiting the eligibility of the recapitalisation scheme:

> "This is in principle an appropriate means to strengthen financial institutions and thus to prevent credit supply restrictions and limit the passing-on of the financial markets difficulties to other businesses. This is all the more so as the Scheme is *exclusively aimed at institutions that are fundamentally sound*, and thus, rather than absorbing new capital simply to ensure their solvency, will be in a position to translate a more comfortable capital levels into increased lending activities".[114]

By contrast, the Commission does not clearly explain the rationale of limiting the eligibility for the *guarantee* scheme. The Commission merely indicated that "the scheme is targeted at the appropriate beneficiaries as the eligibility of participating firms is limited in principle to solvent companies".[115]

With respect to the elaboration of the relevant characteristic, it should be noted that the guarantee schemes use the term "solvent", while the recapitalisation schemes use the term "fundamentally sound".[116] While "fundamentally sound" refers to the well-known indicator (i.e. aid amount exceeding more than 2% of the bank's RWA), the decisions do not apply a uniform definition of 'solvent'.[117] For instance, the under the Swedish guarantee scheme 'solvent' was understood as banks with at least 6% Tier 1 capital and at least 9% combined Tier 1 and Tier 2 capital.[118] In a decision on another scheme, 'solvent' was interpreted as a Tier 1 ratio of 7%.

114. Swedish recapitalisation scheme, N69/2009, 10 February 2009, para. 32. See also: Finnish recapitalisation scheme, N329/2009, 11 September 2009, para. 35.
115. See for instance: Finnish guarantee scheme, N567/2008, 13 November 2008, para. 35.
116. The UK scheme is an exception to this observation, since it limits the eligibility for the entire scheme (which includes a guarantee scheme and recap scheme) to *solvent* banks.
117. The 2013 Banking Communication introduced an additional criterion with respect to the eligibility for guarantee schemes: pursuant to point 60a, the scheme must be restricted to banks without a capital shortfall. The guarantee schemes that were assessed on the basis of the 2013 Banking Communication were all in line with this new requirement. For instance, in July 2013, Poland limited the eligibility of the guarantee scheme to solvent banks which have no capital shortfall according to the most recent Union-wide capital exercise or other equivalent national exercises by the national supervisory authorities. See: Polish guarantee scheme (prolongation), SA.36965, 23 July 2013, para. 5. Footnote 10 specified that 'no capital shortfall' means a capitalization of at least 9% (according to the EBA capital exercise).
118. Swedish guarantee scheme, N533/2008, 29 October 2008, para. 5.

Although the Commission welcomes the fact that the scheme is limited to fundamentally sound/solvent banks, it is not applied consistently. Many recapitalisation schemes were open to fundamentally sound banks as well as distressed banks. While the Commission noted positively the fact that the scheme was aimed at fundamentally sound banks, it did not note negatively the fact that the scheme was open to all banks.

More importantly, the fact that the scheme is limited to fundamentally sound/solvent banks is not really a relevant characteristic. Indeed, even if distressed banks are excluded from the scope of the recapitalisation scheme, they can still be recapitalised by means of an individual aid measure.

8.10.2 Open to subsidiaries of foreign banks

Banks often operate across national borders (through subsidiaries or branches). In principle, subsidiaries and branches of foreign banks should be eligible for a support scheme. This was clearly established by the 2008 Banking Communication. Point 18 of the 2008 Banking Communication requires that the eligibility criteria for a guarantee scheme should be objective and non-discriminatory. Point 18 further specifies that "in application of the principle of non-discrimination on the grounds of nationality, all institutions incorporated in the Member State concerned, including subsidiaries, and with significant activities in that Member State should be covered by the scheme." Although this requirement was specified in the context of guarantee schemes, it also applies to recapitalisation schemes and other types of bank support schemes, pursuant to point 35 and 44 of the 2008 Banking Communication.

The analysis of the bank State aid decisions reveals that all schemes comply with this requirement. There is no scheme that excludes subsidiaries of foreign banks.[119] This can be explained by the fact that the scheme should be open for subsidiaries of foreign banks, is a clear requirement to which Member States have to comply. If a Member State would have proposed a scheme that excluded subsidiaries of foreign banks, then the scheme would most probably not be approved by the Commission.

8.10.3 Maximum budget of the scheme

Most guarantee schemes and recapitalisation schemes had a maximum budget. This was welcomed by the Commission, because a maximum budget ensures that the aid measure is limited to a certain amount.[120] This maximum budget can

119. Only the Irish scheme initially excluded foreign-owned banks, but the exclusion of foreign-owned banks was later reversed. For more information on this particular aspect of the Irish scheme, see: Honohan 2009, p. 220-221; Gebski 2009, p. 93; Kluth & Lynggaard 2013, p. 783. Nicolaides & Rusu 2010, p. 761; Grossman & Woll 2014, p. 586.

120. Hungarian bank support scheme, N664/2008, 12 February 2009, para. 50.

be expressed in absolute terms or in relative terms. The Latvian guarantee scheme is an illustration of the latter: this scheme contained a maximum of 10% of Latvia's GDP.[121] In addition, the maximum budget can relate to the individual bank or to the entire banking sector (or to both). For instance, the Swedish guarantee scheme had both an overall maximum budget and a maximum amount for each beneficiary bank.[122]

Sometimes, when a bank support scheme is prolonged, the Member State choses to *decrease* the maximum budget of the scheme. As a general rule, the Commission notes positively such a decrease.[123] This illustrates clearly that the amount of the budget of the bank support scheme matters to the Commission. The opposite is also possible: in 2010, the ceiling for the Greek guarantee scheme was *increased* from EUR 15 billion to EUR 30 billion.[124] The Commission accepted this amendment to the scheme, because of the specific situation of the Greek banking sector. Because of severe fiscal imbalances, Greece's credit rating was downgraded. Consequently, the credit ratings of Greek banks were also downgraded, which restricted their access to the money market and capital market. [125]

The analysis of the bank support schemes reveals that that most schemes had a maximum budget. Only the Irish guarantee scheme did not have a maximum budget. In its Commission Staff Working Paper, the Commission observed that this made Ireland an exception (compared to the guarantee schemes of the other Member States).[126]

While it is true that a maximum budget ensures that the aid is limited to a certain amount, there are still some questions that can be asked. To what extent is the exact amount of the maximum budget important? And is it only about the amount in absolute terms or should it be related to the size of the banking sector? In the Commission's decisions, only the amount of the maximum budget is mentioned. No reference is made to the size of the banking sector.

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121. Latvian guarantee scheme, N638/2008, 22 December 2008, para. 47. Interestingly, this maximum budget was not discussed in the context of the criterion of necessity, but in the context of the proportionality of the guarantee scheme.
122. This maximum amount consisted of either: a) the sum of that bank's debt instruments, or b) 20% of that bank's deposits as of 1 September 2008. Support measures for the banking industry in Sweden, N 533/2008, 29 October 2008, para. 9.
123. See: Portuguese guarantee scheme (prolongation), N51/2010, 22 February 2010, para. 28.
124. The original Greek guarantee scheme contained a maximum budget of EUR 15 billion. In footnote 2 of the Commission decision (N560/2008, 19 November 2008), it was indicated that this maximum could be amended, but that it could not exceed the amount of EUR 23 billion. It was also indicated that any amendment would have to be approved by the Commission.
125. Greek bank support scheme (amendment), N163/2010, 12 May 2010.
126. Commission Staff Working Paper 2011, p. 48.

8.10.4 Concluding remarks

The present section discussed three characteristics of bank support schemes that are usually welcomed by the Commission in its decisions on bank support schemes. I am of the opinion that although the Commission welcomes these characteristics, the relevance of these characteristics is limited. Indeed, since a Member State can always grant State aid *outside the context of the scheme*, the characteristics that are specific to the scheme have only limited relevance.

8.11 Conclusion

The characteristics that were discussed in this chapter are relevant to the assessment of whether the State aid was appropriate, necessary and proportionate. The conclusion that the State aid was appropriate, necessary and proportionate would result in the temporary approval of the aid. The final approval was dependent on whether the restructuring plan met the three restructuring objectives. As set out in section 8.1, most bank State aid cases were characterised by this two-stage compatibility-assessment.

A remarkable thing about the two-stage compatibility-assessment is that the first and second stage are to some extent *overlapping*. Admittedly, the two stages focus on different aspects of the bank State aid case: the first stage of the assessment mainly concerns the aid, while the second stage of the assessment mainly concerns the restructuring plan. Nevertheless, some of the relevant characteristics discussed in the present chapter are not only relevant to the first stage of the compatibility-assessment, but also to the second stage. In other words: the relevance of these relevant characteristics *transcends the first stage* of the compatibility-assessment.

This finding applies in particular to the relevant characteristics discussed in sections 8.6, 8.7 and 8.8. Indeed, the fact that the bank pays an adequate remuneration to the State (i.e. the relevant characteristic discussed in section 8.6) is also relevant in the context of burden-sharing/own contribution (i.e. the second pillar), because the remuneration constitutes an own contribution. In the same vein, exit incentives and behavioural commitments (i.e. the relevant characteristics discussed in section 8.7 and 8.8) are not only relevant in the rescue phase, but also in the restructuring phase. Consequently, they are relevant in the context of compensatory measures (i.e. the third pillar). The overlap between the first and second stage of the compatibility-assessment is also evidenced by the fact that in several cases, the Commission concluded that the aid could be considered appropriate, necessary and proportionate *in light of the restructuring plan* (see section 8.9).

The finding that the relevance of these relevant characteristics transcends the first stage of the compatibility-assessment has an important implication: the relevance of these relevant characteristics is unaffected by the 2013 Banking Communication, which – as explained in section 8.1 – largely abolished the two-stage compatibility-assessment.

The present chapter has elaborated on recapitalisation measures and guarantee measures, while *asset relief measures* are absent in this chapter. This is because the compatibility of asset relief measures is based on a very specific assessment framework: the IAC, which will be discussed in the following chapter.

Chapter 9. Compatibility with the Impaired Assets Communication

9.1 Introduction

As explained in the previous chapter, State aid measures have to be appropriate, necessary and proportionate. With respect to asset relief measures (also referred to as impaired asset measures[1]), there is a special compatibility-assessment: these measures have to be compatible with the principles of the Impaired Assets Communication (IAC).[2] In that regard, the IAC sets out the following criteria for the compatibility of asset relief measures: i) eligibility of assets, ii) transparency and disclosure, iii) management of assets, iv) valuation, and v) burden-sharing and remuneration.

These five criteria can be found in section 5 of the IAC. The bank State aid decisions explicitly refer to section 5 of the IAC and its various subsections.[3] This makes it all the more surprising that the decisions are structured in a slightly different way than section 5 of the IAC. Since this PhD-study analyses the decisional practice, the present chapter will follow the structure of the decisions (rather than the structure of section 5 of the IAC).

The current chapter discusses how the Commission has analysed the compatibility of impaired assets measures. Asset relief measures can have a complicated structure. Therefore, before focussing on the specific compatibility-criteria,

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1. In the bank State aid decisions, the terms "asset relief measures" and "impaired assets measures" are used interchangeably.
2. In addition, point 16 of the IAC recalls that asset relief measures should comply with the general principles of necessity, proportionality and minimisation of competition distortions.
3. These subsections are:
   - 5.1. Appropriate identification of the problem and options for solution: full ex ante transparency and disclosure of impairments and an upfront assessment of eligible banks
   - 5.2. Burden-sharing of the costs related to impaired assets between the State, shareholders and creditors
   - 5.3. Aligning incentives for banks to participate in asset relief with public policy objectives
   - 5.4. Eligibility of assets
   - 5.5. Valuation of assets eligible for relief and pricing
   - 5.6. Management of assets subject to relief measures

it is useful to describe the basic features of asset relief measures. This will be done in section 9.2. The compatibility-criteria will be discussed in sections 9.4 to 9.10. Before discussing the criteria set out in the IAC, a preliminary question should be addressed: is the IAC applicable? The applicability of the IAC will be discussed in section 9.3.

9.2 Asset relief measures

9.2.1 The rationale of asset relief measures

As footnote 5 of the IAC explains, banks typically hold a variety of assets, such as financial assets (treasury bills, debt securities, equity securities, traded loans and commodities), derivatives (swaps, options) and loans. During the financial crisis, the market value of many assets fell dramatically. As a result, many banks had “impaired assets” on their balance sheets. Impaired assets are assets whose market value has fallen below the book value. Impaired assets are sometimes described by the term “toxic assets”. However, the notion of “impaired assets” is broader than “toxic assets”.[4] Impaired assets also include assets on which high losses are expected.[5]

If losses materialise and a bank has to write down on these assets, then this results in a decline of equity, which might endanger the viability of the bank. Markets know that banks have impaired assets, but they do not know how large the losses on these assets will be. The very existence of impaired assets therefore creates uncertainty. Uncertainty can be around the exposure of banks to impaired assets or around the size of expected losses.

As highlighted before, confidence is crucial to the banking sector. Uncertainty regarding asset valuation can be damaging in several ways. First of all, markets may overestimate the expected losses on impaired assets. Such a negative market perception may result in higher financing costs for banks.[6] Secondly, uncertainty may have repercussions to the real economy. Writing down on impaired assets reduces the bank’s equity. In order to restore the capital ratio, the bank either has to attract new equity or to reduce the RWA. Since investors may not always be interested in providing capital to troubled banks, those banks may opt for the second option (i.e. reducing assets). Reducing the amount of

4. Boudghene & Maes 2012a, p. 778.
5. Another term is “illiquid assets”. These are assets which cannot be sold on the market, because the market may have been frozen or dried up.
6. Landier & Ueda 2009, p. 5. Quigley (2010, p. 353) noted that “the main problem preventing the banks from raising capital on the financial markets was the massive element of bad loans on their books from the property development sector”.

assets can be achieved in two ways. The first way is by not renewing maturing loans. This might lead to a contraction of credit; in other words: a credit crunch. The second way to reduce the amount of assets is by selling some of the assets. However, this may further depress asset prices. This phenomenon is known as "fire sales".

In order to remove market uncertainty and to revive market confidence, Member States have undertaken measures to relieve banks from their impaired assets. The aim of asset relief measures is to reduce the provisioning or write-down needs of the beneficiary bank and to protect its capital base. Asset relief measures remove a source of volatility on the bank's balance sheet. In that regard, asset relief measures free up capital, because they reduce the RWA of the beneficiary bank. The ultimate goal of asset relief measures is improving the financial position of banks and their access to finance and increasing bank lending to the real economy.

9.2.2 Types of asset relief measures

Although asset relief measures can take several forms – asset purchase, asset insurance, asset swap or some hybrid form[7] – annex II of the IAC distinguishes between two broad approaches: i) the segregation of impaired assets from good assets, and ii) an asset insurance scheme. Also in the literature, two main types of asset relief measures are usually distinguished: asset purchases and asset guarantees.[8]

Asset purchase

An asset purchase means that the State effectively purchases the impaired assets from the bank. Usually, the State does not purchase the impaired assets itself. Rather, a special purpose vehicle (SPV) is created, which is fully or partially sponsored by the State. It is the SPV that purchases the impaired assets from the bank. The impaired assets are transferred to the SPV, usually referred to as Asset Management Company. In order to be able to pay for the impaired assets, the SPV needs funding. The SPV has to issue equity or debt to finance its purchase of impaired assets. The SPV is usually sponsored by the state, which means that the state injects capital or guarantees debt.

7. Point 11 of the IAC.
8. See: Boudghene & Maes 2012b, p. 4.

Asset guarantee

An asset guarantee is a form of insurance. The State commits to bear some or all of the losses on the impaired assets. Usually, the losses are divided into tranches. The first tranche of losses – sometimes referred to as “the first-loss position” – will be borne by the bank, while the second tranche of losses will be borne by the State. In exchange for this guarantee, the bank has to pay a fee.[9]

Asset guarantee measures can be structured in different ways. Sometimes, the second tranche of losses is entirely borne by the State; sometimes, the bank also has to bear part of the second tranche of losses. For instance, in the UK Asset Protection Scheme, the UK government committed to cover 90% of the losses in excess of the first-loss position, so 10% of the second tranche of losses would be borne by the bank.[10]

Sometimes, there are only two tranches; sometimes, there are three tranches (in which case the State only covers the second tranche; losses beyond the second tranche are covered by the bank).[11]

The differences between both types of asset relief measures

While asset purchases and asset guarantees are both asset relief measures, there are some important differences between them. The first difference concerns the upside potential. The market value of an impaired assets portfolio is not constant. On the one hand, there is a risk that the value of the portfolio will decrease. This is known as the downside risk.[12] On the other hand, there is a chance that the value of the portfolio will increase. This is known as the upside potential. Asset purchase measures and asset guarantee measures have in common that the downside risk is (partially or fully) transferred to the State. But in the case of an asset guarantee, the impaired assets remain on the bank’s balance sheet. As a result, if the value of the impaired asset portfolio increases, then the bank will benefit. So the upside potential remains with the bank. From the viewpoint of the bank, this is an advantage, while from the viewpoint of the state, it is disadvantageous.

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9. Sometimes, the bank is also obliged to lend to the real economy at agreed levels on commercial terms. See Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 42.
10. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 42.
11. See, for instance: HSH Nordbank, N264/2009, 29 May 2009, para. 15.
12. Another definition of ‘downside risk’ is: the risk that ex post losses will turn out to exceed ex ante expected losses. See Boudghene & Maes 2012a, p. 778.

The second difference concerns the payment. An asset purchase implies that the SPV has to pay for the impaired assets. This constitutes an advantage for the bank (who receives cash or receivables), and a disadvantage for the State (who has to make an upfront investment).[13] In the case of an asset guarantee, there is no need for such an upfront investment.[14]

To sum up: in the case of an asset purchase, the State has to make an upfront investment, but enjoys the upside potential. In the case of an asset guarantee, the State does not have to make an upfront investment, but it does not enjoy the upside potential.

9.2.3 Asset relief scheme

In most instances, asset relief measures were granted as ad hoc aid. There are, however, also some cases in which asset relief measures were granted in the context of an asset relief scheme. Two prime examples of asset management companies are NAMA in Ireland and SAREB in Spain.[15] Other asset relief schemes are: the Austrian asset relief scheme, the German asset relief scheme (N314/2009, 31 July 2009) and the Lithuanian asset relief scheme (N47/2010, 5 August 2010). Interestingly, these schemes have never been used.

NAMA – which stands for National Asset Management Agency – was the asset relief scheme for banks in Ireland. This scheme was approved by the Commission by decision of 26 February 2010.[16] The impaired asset measures by which the impaired assets were transferred from the Irish banks to the NAMA were not assessed individually by the Commission. The decisions on the Irish banks that also benefited from other State aid measures do thus not contain an assessment of the compatibility of the impaired asset measures to the IAC. Nevertheless, reference is made to the NAMA and the decision approving the NAMA.

The approach with respect to NAMA stands in contrast to the approach with respect to the Spanish asset management company SAREB ("*Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria*"). Unlike the decision on NAMA, there is no overall decision in which the transfers of impaired assets to the SAREB are approved. The measures by which the impaired assets were transferred to the SAREB were assessed separately for each individual beneficiary bank.[17]

13. Point 11 of the IAC recognises that the budgetary situation of the Member State is an important consideration in the choice of asset relief measure.
14. Boudghene, Maes & Scheicher 2010, p. 14.
15. For more information about NAMA, see, inter alia: Quigley 2010; Murphy 2013.
16. NAMA, N725/2009, 26 February 2010.
17. Banco Mare Nostrum, NCG, Banco CEISS, Liberbank, Cajatres.

9.2.4 Overview of asset relief measures

Which banks benefited from an asset relief measure? The table in Annex VI provides an overview of the asset relief measures. The table indicates which banks have benefited from an asset relief measure. In addition, the table indicates the type of asset relief measure (asset purchase, asset guarantee or a hybrid form).

9.3 Applicability of the IAC

** The fact that the measure has the effect of relieving the bank from its impaired assets.*

9.3.1 Material scope of the IAC

Asset relief measures have to be assessed under the Impaired Assets Communication (IAC). However, State aid measures are sometimes designed in such a way that it is not crystal clear whether they qualify as asset relief measures. The IAC defines asset relief as any measure whereby a bank is dispensed from the need for severe downward value adjustments of certain asset classes. In deciding whether a State aid measure has to be assessed under the IAC, the Commission looks at the effect of the State aid measure. If the aid measure has the effects of an asset relief measure, then it falls within the scope of the IAC.

That the IAC has to be applied to all measures that qualify as asset relief measure was stressed by the Commission in its decision on the risk shield of HSH Nordbank. In this case, Germany argued that the IAC was not applicable to the risk shield. According to Germany, the IAC had to be regarded "as an administrative instruction only, designed solely to ensure consistent administrative practice and binding on the Commission alone". Germany therefore argued that the compatibility of the risk shield with the internal market should be assessed directly under the TFEU.[18] The Commission held as follows:

> "Contrary to what is argued by Germany, the Impaired Assets Communication does not serve merely to ensure consistent administrative practice. Rather, it sets out the State aid rules to be applied to asset relief measures. Taking account of their specific features, it translates the State aid rules into compatibility criteria to be applied to such measures. Applying the Impaired Assets Communication should ensure consistency between asset relief measures introduced by the Member States and compliance with State aid monitoring requirements. (…) Thus the objectives of the Communication

18. HSH Nordbank, SA.29338, 20 September 2011, para. 110-112.

> are broader than what is argued by Germany, and are not confined to administrative practice. To fulfil the above objectives the Commission has to apply the Impaired Assets Communication to all asset relief measures".[19]

The question as to the applicability of the IAC was addressed in several cases. For instance, in the case of the Austrian bank BAWAG, Austria argued that the IAC was not applicable. The asset relief measure in the case of BAWAG had a complicated structure. BAWAG had sold its impaired assets to four indirectly wholly-owned special purpose subsidiaries and agreed that these special purpose subsidiaries could defer payment.[20] Austria had granted a guarantee for the payment of the receivables from the special purpose subsidiaries. Austria argued that the IAC was not applicable to the guarantee.[21] However, the Commission considered that – since the equity of the subsidiaries was relatively low – an impairment of the assets by the subsidiaries would almost certainly lead to an impairment of the receivables.[22] The Commission therefore concluded that the measure acted as if it guaranteed the underlying impaired assets and provided BAWAG with an asset relief. The measure thus fell within the scope of the IAC.

The remainder of this subsection will focus on two particular situations that raise the question whether the IAC is applicable: i) asset relief measures which are similar to recapitalisation measures (see subsection 9.3.1.1), and ii) the split-up of the bank (see subsection 9.3.1.2).

9.3.1.1 Asset relief measures which are similar to recapitalisation measures

Some asset relief measures are very similar to recapitalisation measures. This raises the question whether these measures should be considered as recapitalisation measures or as asset relief measures. The cases of OVAG, HGAA, ABN AMRO and KBC illustrate how the Commission has addressed this question. These cases will be discussed below.

The Austrian banks Hypo Group Alpe Adria (HGAA) and Österreichische Volksbanken AG (OVAG) both benefited from an asset guarantee. This asset guarantee differed from standard impaired asset measures, because it was structured in such a way that it did not influence the banks' RWA. Rather, it was aimed at reducing the loan-loss provisions that the banks had already made for expected losses on the covered assets. OVAG and HGAA would be able to draw the guarantee and request the recourse from the State (the guarantor) if

19. HSH Nordbank, SA.29338, 20 September 2011, para. 162.
20. BAWAG, N640/2009, 22 December 2009, para. 25.
21. BAWAG, N640/2009, 22 December 2009, para. 39.
22. BAWAG, N640/2009, 22 December 2009, para. 54.

they provided evidence that the debt was irrecoverable and only if and as far as the recourse was necessary to avoid that the Common Equity Tier 1 ratio would fall below a certain threshold. The asset guarantee also differed in other aspects from a standard impaired asset measure, since the asset guarantee covered the first-loss position. In addition, any amount drawn needed to be repaid to the State. The Commission concluded that the asset guarantee, as it was constructed, protected the capital base of OVAG and HGAA. It was therefore similar to a capital injection (and should thus be assessed as such).[23]

One of the aid measures in the case of ABN AMRO was a capital relief instrument (CRI). The CRI had a very particular background: it was related to the consequences of the acquisition of ABN AMRO Holding by the Consortium (Fortis, RBS and Santander) in 2007. The consortium members intended to separate ABN AMRO Holding into three parts and created so-called 'tracking shares' representing the economic ownership of the businesses attributed to each consortium member. Fortis became the economic owner of ABN AMRO N. Items that were not allocated to the individual consortium members were brought together in the so-called ABN AMRO Z-share ("ABN AMRO Z"). Each consortium member held a pro-rata stake in ABN AMRO Z. In October 2008, the Dutch State acquired Fortis Bank Nederland (FBN) and the ABN AMRO Holding assets owned by FBN.

The CRI covered the Dutch mortgage portfolio of ABN AMRO N.[24] With respect to the CRI-measure, the Commission noted that the guaranteed portfolio was not made of impaired assets. By contrast, it was a traditional Dutch mortgage portfolio of which neither ABN AMRO N nor external experts expected the performance to deteriorate to a significant extent.[25] The Commission considered that the CRI was de facto a proxy for a recapitalisation measure: the CRI-measure reduced the RWA of ABN AMRO N. Accordingly, it provided a capital relief and therefore covered the capital shortage (at the level of ABN AMRO Z) without implementing a standard capital increase.[26] The Commission noted that the choice of the Dutch State to grant a credit protection instrument instead of a standard recapitalisation had been only dictated by the fact that prior to the separation of ABN AMRO N from the ABN AMRO Holding, the Dutch State could not ring-fence capital contributions in ABN AMRO Bank. In other words, since ABN AMRO N was not a separate legal entity, a capital injection in ABN AMRO Bank could also have benefited the other two consortium members.[27]

23. Österreichische Volksbanken AG (OVAG), SA.31883, 19 September 2012, para. 91; Hypo Group Alpe Adria (HGAA), SA.32172, 19 July 2011, para. 30.
24. ABN AMRO, C11/2009, 5 April 2011, para. 101.
25. ABN AMRO, C11/2009, 5 April 2011, para. 294.
26. ABN AMRO, C11/2009, 5 February 2010, para. 104.
27. ABN AMRO, C11/2009, 5 April 2011, para. 109.

Even though the Commission concluded that the CRI was de facto a proxy for a recapitalisation measure, it considered that the CRI-measure should be *assessed by analogy* on the basis of the principles laid down in the IAC, in order to ensure that the CRI-measure was consistent with other capital relief schemes.[28] In particular, in order to maintain a level playing field, the Commission assessed whether the CRI was not used to shift expected losses on the portfolio to the Dutch State.

It should be noted that – in contrast to the asset guarantee in the case of OVAG and HGAA – the CRI was designed as a typical asset relief measure: ABN AMRO N kept a first-loss of 20% and a vertical slice of 5% of the remaining risk.[29]

The State Protection measure in the case of KBC was structured in three tranches. Losses within the first tranche had to be borne by KBC. For losses within the second tranche (the "Equity Range"), the Belgian State would provide fresh capital to KBC. For losses within the third tranche (the "Cash Range"), the Belgian State would provide KBC with cash. The Commission considered that a distinction should be made between the Equity Range and the Cash Range of the measure. The Commission considered that the Cash Range, where the Belgian State is committed to compensate KBC for losses in cash, should be considered as an asset relief measure. Therefore its compatibility was assessed under the IAC. By contrast, the Commission considered that the commitment to inject capital, subject to the trigger event of specific realised losses, associated with the Equity Range should be considered as equivalent to a capital injection. Therefore, the compatibility of the Equity Range was assessed under the Recapitalisation Communication.[30]

9.3.1.2 The split-up of the bank

In several cases, the beneficiary bank was split-up into a good bank (to be sold) and a bad bank (to be wound-down).[31] For instance, Dunfermline Building Society was split-up; the good part of Dunfermline was transferred to Nationwide (following an open and transparent tender), while the remaining part ("Rump Dunfermline") was put in wound-down. The Commission treated the break-up of Dunfermline Building Society as an asset relief measure.[32] Consequently, the Commission applied the IAC. In its decision on Dunfermline, the Commission pointed out that the Dunfermline business transferred to Nationwide, being the continuation of economic activity of the former Dunfermline,

28. ABN AMRO, C11/2009, 5 February 2010, para. 103; ABN AMRO, C11/2009, 5 April 2011, para. 284.
29. ABN AMRO, C11/2009, 5 April 2011, para. 104-105.
30. KBC, C18/2009, 18 November 2009, para. 119-120.
31. In this PhD-study, this is referred to as the S/T/W-context.
32. Dunfermline, NN19/2009, 25 January 2010, para. 68-70.

would not have to bear the consequence of potential losses on the assets left behind in the Rump Dunfermline. The Commission noted that the effect of the aid measures undertaken by the UK was the creation of an entity (sold to Nationwide) *that was relieved from the impaired assets* of its predecessor.[33]

This consideration can also be found in other decisions (taken in the S/T/W-context). For instance, in the decision on Northern Rock, the Commission held that the effect of the aid measures undertaken by the UK had resulted in the creation of a bank (i.e. BankCo) that is relieved from the impaired assets of its predecessor (i.e. Northern Rock).[34] By the same token, the split-up of Quinn and of Parex Banka was considered as an asset relief measure.[35]

Remarkably, there are also cases (in which the bank was split-up) that were not treated as asset relief measures. This is the case for KA[36], Eik Banki, Amagerbanken, Fionia Bank, Banco Espirito Santo and Bradford&Bingley.

9.3.2 Temporal scope of the IAC

Should the IAC be applied to asset relief measures that were introduced before the adoption of the IAC on 26 March 2009? This question was answered in the affirmative in several decisions.[37] For instance, in the decision on WestLB, the Commission held as follows:

> "Although the measure at issue predates the adoption of the Impaired Assets Communication, the Commission has to apply the law and guidelines in force at the time its decision is adopted, irrespective of the time at which the aid measures were designed or notified".[38]

9.3.3 Relevance of the applicability-question

Why does it matter if a State aid measure has to be assessed under the IAC? The classification of a State aid measure as an asset relief measure means that the measure can only be authorised by the Commission if it satisfies the criteria of the IAC. In that regard, section 5 of the IAC sets out several criteria that have to be complied with. These IAC-criteria will be discussed in the following sections of the present chapter.

33. Dunfermline, NN19/2009, 25 January 2010, para. 68.
34. Northern Rock, C14/2008, 28 October 2009, para. 105.
35. Parex Banka, C26/2009, 15 September 2010, para. 109.
36. The case of KA is even more remarkable, because even though the Commission considered that the split-up of KA had to be regarded as an impaired asset measure, it did not explicitly apply the IAC to this case.
37. BayernLB, SA.28487, 5 February 2013, para. 126; WestLB, C40/2009, 20 December 2011, para. 125; HSH Nordbank, SA.29338, 20 September 2011, para. 155.
38. WestLB, C40/2009, 20 December 2011, para. 125.

9.4 Eligibility of assets

* *The fact that the 'eligibility-criterion' of the IAC has been met.*

The compatibility-assessment usually starts with the 'eligibility-criterion' of the IAC. In that regard, many decisions recall that "section 5.4 of the IAC[39] indicates that asset relief requires a clear identification of impaired assets and that certain limits apply in relation to eligibility to ensure compatibility".[40]

In most cases, the eligibility of assets is not really an issue. For instance, in the case of Landesbank Baden-Württemberg (LBBW), the guaranteed portfolios mainly consisted of assets such as RMBS, CMBS, CDO's, CLO's and ABS.[41] The Commission held that these are "typically assets for which there is a market failure and at which impaired asset relief measures are targeted".[42] Similarly, in the case of the Belgian bank KBC, the Belgian State had granted protection on KBC's CDO portfolio.[43] Since only CDO's were covered, this case did not raise any issues of eligibility. The Commission recalled that in Annex 3 of the IAC, CDO's are mentioned as examples of impaired assets which can be included in relief operations without doubts as to their eligibility.[44] Thus, in cases involving structured securities, it is quite easy to establish that the 'eligibility-principle' of the IAC has been met.

However, not only structured securities are eligible to asset relief measures. The approach of the Commission with respect to the eligibility of assets can be characterised as broad. This is apparent from point 32 of the IAC, which proposes "a pragmatic approach including elements of flexibility, which would ensure that other assets also benefit from relief measures to an appropriate extent and where duly justified". This is elaborated in points 34 and 35 of the IAC. Point 34 provides for the possibility of extending eligibility to "well-defined categories of assets corresponding to the systemic threat upon due justification, without quantitative restrictions". Point 35 provides for the possibility for banks to be relieved of impaired assets outside the scope of eligibility set out in points 32, 33 and 34 of the IAC without the necessity of a specific justification for a maximum of 10-20 % of the overall assets of a given bank. Point 36 of the IAC is

39. Section 5.4 of the IAC corresponds to points 32-36 of the IAC.
40. This is a standard consideration which can be found in many decisions. See, for instance: MKB, 16 December 2015, para. 93.
41. The abbreviations RMBS, CMBS, CDO's, CLO's and ABS stand for residential mortgage-backed securities, commercial mortgage-backed securities, collateralized debt obligations, collateralized loan obligations and asset-backed securities.
42. Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 57.
43. KBC, C18/2009, 30 June 2009, para. 29.
44. KBC, C18/2009, 30 June 2009, para. 73.

also of importance, since it stipulates that the wider the eligibility criteria, the more thorough the restructuring and the remedies to avoid undue distortions of competition will have to be.[45]

The broad approach of the Commission as regards the 'eligibility of assets-principle' is visible in several decisions. For instance, in the case of WestLB, the bad bank did not only consist of structured securities but comprised also corporate, State, municipal, and student loans. The Commission recalled that the IAC recognised the necessity of a pragmatic and flexible approach to the selection of asset types for impaired assets measures. Furthermore, the Commission noted that the range of asset classes affected by the financial crisis became broader due to spill-over effects. In particular, student loans and securities related to shipping, aircraft and real estate in general, face illiquid markets and/or were subject to severe downward adjustments. The Commission therefore considered that asset relief for such assets could help to achieve the objectives of the IAC, even if such assets were not included in the assets classes that initially triggered the financial crisis. However, the Commission held that pursuant to point 36 of the IAC, the comparatively broad range of assets affected required an increased depth of restructuring.[46]

9.5 Transparency and disclosure

* *The fact that the 'transparency and disclosure-criterion' of the IAC has been met.*

As regards the 'transparency and disclosure-criterion', many decisions refer to section 5.1 of the IAC[47], which requires full *ex ante* transparency and disclosure of impairments on the assets which will be covered by the relief measures.[48] The term 'ex ante' means that disclosure and valuation should take place *prior* to government intervention.

45. In several decisions, the Commission referred to point 36 of the IAC: WestLB, C40/2009, 22 December 2009, para. 56; HSH Nordbank, SA.29338, 20 September 2011, para. 167; Banco de Valencia, SA.34053, 28 November 2012, para. 133.
46. WestLB, C40/2009, 22 December 2009, para. 56.
47. Section 5.1 of the IAC corresponds to points 19 and 20 of the IAC.
48. As the Commission explains in footnote 1 relating to point 20 of the IAC, the terms 'transparency' and 'full disclosure' should be understood as meaning transparency vis-à-vis the national authorities, the independent experts involved and the Commission.

As the Commission explained in one of its decisions, ex-ante transparency implies a clear identification of the assets and exposure. This is necessary to identify the amount of aid in the asset relief measure and to ascertain whether the aid is needed to address a temporary problem or whether the bank in question is technically insolvent.[49]

Point 20 of the IAC also stresses that transparency should be based on adequate valuation certified by recognised independent experts and validated by the relevant supervisory authority.[50]

In addition, point 20 of the IAC stipulates that the valuation should be in line with the principles of valuation developed in section 5.5 of the IAC. Valuation is a requirement that appears in section 5.5 of the IAC, but it is also part of the requirement of section 5.1 of the IAC. This is also apparent in the Opening Decisions on ING[51] (31 March 2009, para. 58) and on LBBW (30 June 2009, para. 60), in which the Commission concluded that the requirement of section 5.1 of the IAC was met, *with the exception of the issue of proper valuation*. Further in these two decisions, in the context of section 5.5 of the IAC, the Commission indicated that it had doubts regarding the valuation. In my opinion, the relation between section 5.1 and 5.5 of the IAC can be understood as follows: section 5.5 concerns the *methodology* of the valuation, whereas section 5.1 concerns the procedural aspects (i.e. there should be an *ex ante* valuation and the valuation should be *certified and validated*).

Although in some Opening Decisions[52] the Commission may have expressed some doubts, in the end, the Commission always concluded that the 'transparency and disclosure-criterion' of section 5.1 of the IAC was met.

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49. Northern Rock, C14/2008, 28 October 2009, para. 107.
50. For instance, in the decision on Banka Celje/Abanka, the Commission noted positively that independent consultants had been engaged by Slovenia to review the quality of assets in the context of the Slovenian Asset Quality Review 2013 exercise and that the valuation of the assets had been performed by the Bank of Slovenia. Banka Celje/Abanka, SA.38522, 16 December 2014, para. 115.
51. Even though ING is a multinational which operates worldwide, I refer to it as a *Dutch* bank (since it is headquartered in Amsterdam, Netherlands). In that regard, it is noteworthy that companies can have several 'nationalities'; this is the case when the 'legal home', 'financial home' and 'home for managerial talent' differ. This phenomenon – which is known as "multiple corporate citizenship" – is discussed in the pioneering work of A.A. Bootsma et al. Equally noteworthy: the fact that many banks operate cross-border was used by E.V.A. Eijkelenboom in her awesome contribution at the IvO/ICFG-conference of 3 December 2014 ("De toekomst van het toezicht op accountants"), in which she drew some parallels between the banking union on the one hand and the (need for) European supervision on cross-border audit firms on the other hand.
52. See, for instance: WestLB, C40/2009, 22 December 2009, para. 57-59.

9.6 Management of the assets

* *The fact that the 'management-criterion' of the IAC has been met.*

The 'management-criterion' relates to the management of assets. In that regard, section 5.6 of the IAC[53] requires a clear functional and organisational separation between the beneficiary bank and its impaired assets in order to prevent conflicts of interest and facilitate the beneficiary bank's focus on the restoration of viability.[54] How this IAC-criterion is interpreted in the decisional practice, depends on the type of asset relief measure.

In case of an asset purchase

In case of an asset purchase, the impaired assets are hived off the bank's balance sheet. As a result, the 'management-criterion' is clearly met. For instance, several Spanish banks transferred impaired assets to an Asset Management Company (AMC). Since the AMC is fully independent from the banks, the Commission concluded that the separate asset management was in line with the requirements of the IAC.[55]

In case of a split-up of the bank

Also in case of a split-up of the bank, the 'management-criterion' is clearly met. For instance, in the case of Dunfermline (in which the good parts were sold to Nationwide, while the remaining parts were wound-down in Rump Dunfermline), the Commission noted that the impaired assets remaining in the Rump Dunfermline were managed exclusively by the Rump Dunfermline and its administrators. The Rump Dunfermline was separate and organisationally independent from the transferred entity. The Commission therefore concluded that the requirements of section 5.6 of the IAC were met.[56] To conclude, in case of a split-up of the bank, the impaired assets (remaining in the bad bank) are functionally and organisationally separated from the good bank.

In case of an asset guarantee

A defining feature of the asset guarantee is that the impaired assets remain on the bank's balance sheet. In such a case, how can a 'clear functional and organisational separation between the beneficiary bank and its impaired assets' be achieved?

In the case of HSH Nordbank, the shielded assets remained on the bank's balance sheet under direct management and supervision of the bank. The Commission had therefore doubts about the compatibility of the measure in relation

53. Section 5.6 of the IAC corresponds to points 44-46 of the IAC.
54. Point 46 of the IAC.
55. Liberbank, SA.35490, 20 December 2012, para. 106.
56. Dunfermline, NN19/2009, 25 January 2010, para. 75.

to the management of the assets.[57] In the final decision, the Commission noted favourably that HSH Nordbank had set up a restructuring unit; this was an internal winding-down bank with separate management.[58]

Also in the case of BayernLB, a restructuring unit was set up (which was functionally and organisationally separated from the bank's other units).[59] The Commission therefore considered that Germany had put in place adequate safeguards to prevent conflicts of interest and to ensure that losses on the covered assets were reduced to the minimum.[60]

Similarly, in the decision on RBS, the Commission noted that adequate safeguards were put in place to prevent conflicts of interest.[61] In addition, the Commission considered the 10% vertical slice of losses in excess of the first-loss as a positive element, because this gave RBS an incentive to maximise recoveries on defaulted assets and hence minimising losses.[62]

To sum up, even though the impaired assets remained on the bank's balance sheet, the Commission always concluded that the 'management-criterion' was met, when adequate safeguards were in place to prevent conflicts of interest.

9.7 Valuation

* *The fact that the 'valuation-criterion' of the IAC has been met.*

9.7.1 Market value, transfer value and 'real economic value'

An important issue is the valuation of impaired assets. Before discussing the valuation-criterion of the IAC, it is useful to clarify the various concepts of value. A distinction can be made between the i) nominal value, ii) market value, iii) real economic value (REV), and iv) transfer value.

The *market value* is what the market is willing to pay for the assets. Normally, the market value should reflect the intrinsic value of financial assets. However, the market value of impaired assets does not reflect their intrinsic value. The IAC therefore introduces the concept of *real economic value*. The real economic value corresponds to the net present value of the underlying cash flows,

57. HSH Nordbank, C29/2009, 22 October 2009, para. 45.
58. HSH Nordbank, SA.29338, 20 September 2011, para. 169.
59. BayernLB, SA.28487, 5 February 2013, para. 141.
60. In that regard, it ensures that the aid is limited to the minimum. See also: UNNIM Banc, SA.33733, 25 July 2012, para. 171-172.
61. These safeguards included adequate independent oversight and supervision rules, conflict of interest resolution policies and a right for HM Treasury to step in to potentially take over the management of covered assets if needed. See Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 178. See also: Banco CAM, SA.34255, 30 May 2012, para. 154.
62. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 178.

and should reflect the underlying long-term economic value of the assets.[63] The ex ante expected losses on the impaired assets are taken into account in the calculation of the real economic value.

Another value concept is the *transfer value*. The transfer value is the price that the State-sponsored special purpose vehicle (SPV) pays for the assets. In case of an asset purchase, the impaired assets are really transferred to the State-sponsored SPV. But what is the 'transfer value' in case of an asset guarantee? In such a case, the 'transfer value' corresponds to total nominal value of the shielded assets minus the first-loss tranche.[64] In other words: the transfer value is understood as the insured amount.[65]

The difference between the transfer value and the market value is the amount of aid that is incorporated by the asset relief measure. The aid amount thus corresponds to *the difference between the transfer value of the assets and the market value*. It should be pointed out that in case of an asset guarantee, the aid amount results from the difference between the transfer value and the market value of the shielded assets, *capped at the notional amount of the guarantee*.[66]

The different concepts of value can be clarified by means of an example. Assume that the nominal value of the portfolio of impaired assets is EUR 100, whereas the market value is only EUR 50. Assume that the REV is EUR 80 and that the portfolio is transferred at a price of EUR 80 (i.e. the transfer value is EUR 80). The aid amount incorporated in the asset transfer is 30 (i.e. the difference between the transfer value of 80 and the market value of 50). The bank has to write-down the portfolio from 100 to 80, so the own contribution of the bank is 20. This own contribution is known as 'burden-sharing' and will be discussed in depth in section 9.8.

63. Sometimes referred to as 'fundamental value'. See: Landier & Ueda 2009, p. 22.
64. This is also formulated as "the point at which the State compensates the bank for losses in the form of cash" (see KBC, C18/2009, 18 November 2009, para. 124).
65. Footnote 1 related to point 41 of the IAC.
66. In some cases, the difference between the transfer value and the market value exceeds the notional amount of the guarantee. For an example, see: BayernLB, SA.28487, 5 February 2013, para. 128. See also: "To this end the assets should be valued on the basis of their current market value, whenever possible. Given that the market for the assets in the portfolio has mostly dried up, as claimed by the German authorities, this implies that there is no market price in the absence of a market as defined by the Communication on impaired assets. Therefore the aid amount is likely to be the same as the amount of the guarantee, i.e. € 5 billion." (WestLB, C43/2008, 12 May 2009, para. 58).

9.7.2 Valuation methodology

The transfer value should be based on the real economic value (REV).[67] The valuation of the impaired assets is therefore very important. In that regard, section 5.5 of the IAC[68] notes that a correct and consistent approach to valuation is of key importance to prevent undue distortions of competition.[69]

In cases involving asset relief measures, Member States provide evidence (usually from the national supervisory authority or a contracted valuation expert) explaining how the transfer value was calculated. That valuation and the underlying methodology is scrutinised by the Commission. To this end, the Commission enlists assistance from external valuation experts.

The assessment of the valuation methodology is very technical and the Commission decisions do not contain much information about the precise assessment. Indeed, many decisions only mention that the Member State had appointed an external expert to assess the portfolio (in order to determine the transfer value) and that the national supervisory authority had validated the valuation. In addition, it is usually indicated that the Commission has contracted external experts to scrutinise the valuation.

There are a few decisions that elaborate a bit on the Commission's assessment of the valuation methodology. For instance, in the decision on Dexia, the Commission indicated that it assessed whether (i) the valuation was based as far as possible on observable inputs, (ii) it made realistic and prudent assumptions about future cash flows, and (iii) it was based on prudent stress-testing at the time that the valuation was carried out.[70] Mainly when the Commission has doubts whether the 'valuation-criterion' has been met, the (opening) decision elaborates on the valuation method. For instance, in its Opening Decision on LBBW, the Commission noted that its external experts indicated doubts on the establishment of the REV of the guaranteed portfolios, in particular as regards (i) the choice of default probabilities for some assets, (ii) the choice of default correlations, (iii) the choice of some recovery rates, (iv) house price assumptions, and (iv) other valuation issues.[71]

Of special interest is point 38 of the IAC, which provides that where the valuation of assets appears particularly complex, alternative approaches could be considered such as the creation of a 'good bank' (whereby the State would purchase the good rather than the impaired assets) or public ownership of a bank

67. Pursuant to point 41 of the IAC.
68. Section 5.5 of the IAC corresponds to points 37-43 of the IAC.
69. In particular, point 42 of the IAC stresses that the valuation should take place according to the principles listed in Annex IV of the IAC.
70. Dexia, C9/2009, 26 February 2010, para. 154.
71. Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 69.

(including nationalisation). In case of a nationalisation, no ex-ante valuation of assets is needed insofar as the valuation is carried out over time in the context of restructuring or liquidation. In its decisional practice, the Commission referred only once to point 38 of the IAC. This only reference can be found in the decision on Northern Rock, which was nationalised in 2008 by the UK State. The Commission considered that "according to the IAC, the objective of valuation is to calculate the amount of aid and thus the level of competition distortion for the purposes of determining how far-reaching the restructuring should be".[72] The Commission considered the restructuring in this case to be very far-reaching. In view of the nationalisation of Northern Rock and the far-reaching restructuring, the Commission concluded that an ex ante valuation was not necessary.[73] In my opinion, this decision is quite special in the sense that the assessment of the 'valuation-criterion' already mentions the extent of restructuring.

In a few other cases, the Commission came to the conclusion that no ex ante valuation of the assets had been conducted. One of these cases was the case of Dunfermline Building Society, a financial services institution based in the UK. It should be recalled that Dunfermline was split-up: the good part of Dunfermline was transferred to Nationwide (following an open and transparent tender), while the remaining part ("Rump Dunfermline") was put in wound-down. The transfer of the good part of Dunfermline to Nationwide was facilitated by means of State aid (which the Commission considered to be an impaired asset measure). This State aid measure was unrelated to the REV of the impaired assets remaining in Rump Dunfermline. Rather, it was based on the amount of cash needed to compensate depositors and ensure the sale of the good part of Dunfermline's business. Consequently, the exposure of the UK to the Rump Dunfermline was not determined objectively ex-ante.[74] The Commission therefore concluded that the measure did not meet the valuation-criterion of the IAC. The same consideration can be found in the decision on Quinn Insurance.[75] This case was similar to that of Dunfermline, in the sense that the split-up of Quinn Insurance was also treated as an asset relief measure. If there is no valuation, then there is a risk that the transfer value is too high (as compared to the REV). This illustrates the importance of a (correct) valuation.

The 'valuation-criterion' of the IAC is quite related to the burden-sharing requirement of the IAC. Indeed, if the valuation is based on assumptions that are too optimistic, then the estimated REV is probably higher than the actual REV.

72. Northern Rock, C14/2008, 28 October 2009, para. 108-110.
73. Northern Rock, C14/2008, 28 October 2009, para. 111.
74. Dunfermline, NN19/2009, 25 January 2010, para. 76.
75. Quinn Insurance, SA.33023, 12 October 2011, para. 112.

Consequently, the transfer value (based on the estimated REV) exceeds the actual REV. This would mean that burden-sharing is likely to be insufficient. The issue of burden-sharing will be explored further in the next section.

9.8 Burden-sharing and remuneration

* *The fact the 'burden-sharing and remuneration criterion' of the IAC has been met.*[76]

9.8.1 Burden-sharing through a write-down/first-loss tranche

As regards burden sharing, the IAC states in section 5.2 the general principle that banks ought to bear the losses associated with impaired assets to the maximum extent.[77] That implies first[78] that the bank should bear the difference between the nominal value and the real economic value of the impaired assets.[79] It should be recalled that the difference between the nominal value and the real economic value corresponds to the expected losses on the impaired assets. The principle of burden-sharing requires that these losses are not borne by the State, but by the bank. This is achieved by a write-down of the impaired assets from their nominal value to the real economic value. In case of an asset guarantee, burden-sharing can be achieved by retaining a first loss commensurate to such write-down.[80] In some of its decisions, the Commission clarified that the first-loss tranche should be sufficiently large to cover all expected losses of the portfolio.[81] Point 24 of the IAC stipulates that the first-loss tranche should normally be at least 10% of the shielded portfolio.[82]

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76. In the Commission decisions, 'burden-sharing' and 'remuneration' are often bracketed together. This would suggest that burden-sharing is only achieved by means of a correct remuneration. However, it should be pointed out that burden-sharing is also related to other compatibility-criteria. This follows from point 21 of the IAC, according to which banks should "bear the losses associated with impaired assets to the maximum extent". Point 21 requires *ex ante transparency and disclosure*, followed by the *correct valuation* of assets prior to government intervention and a *correct remuneration* of the State for the asset relief measure. Burden-sharing is thus related to the following three criteria: i) transparency and disclosure, ii) valuation, and iii) remuneration.
77. Section 5.2 of the IAC corresponds to points 21-25 of the IAC.
78. Furthermore, the Impaired Assets Communication explains that burden-sharing is achieved through an adequate remuneration of the aid.
79. ING, C10/2009, 31 March 2009, para. 72; Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 75.
80. See also: Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 75-76.
81. See, for instance: UNNIM Banc, SA.33733, 25 July 2012, para. 129; Banco CAM, SA.34255, 30 May 2012, para. 117.
82. See also: HSH Nordbank, C29/2009, 22 October 2009, para. 49-50.

9.8.2 Claw-back

As a general rule, an asset relief measure can only be declared compatible *if the transfer value is equal to or below the real economic value*. A transfer value above the real economic value means that the aid amount is too large, since only the difference between the transfer value and the market value can constitute compatible aid. The additional aid (corresponding to the amount by which the transfer value exceeds the REV) can only be allowed if it is accompanied by the introduction of conditions allowing the recovery of the additional aid at a later stage, i.e. a so-called claw-back. If no full recovery (claw-back) is possible, far-reaching restructuring must be provided for. This follows from point 41 of the IAC and is reiterated in Annex IV of the IAC: "The greater any deviation of the transfer value from the 'real economic value', and thus the amount of aid, the greater the need for remedial measures to ensure accurate pricing over time (for example, through better fortune clauses) and for more in-depth restructuring".[83]

The burden-sharing principle can be clarified by means of the following example. Assume a portfolio with a nominal value of EUR 100, a real economic value of EUR 80 and a market value of EUR 50. The transfer value should not exceed the real economic value of EUR 80. Assume, however, that the transfer value is set at EUR 85. In this case, the own contribution by the bank is only EUR 15 (i.e. the difference between the nominal value and the transfer value), while the own contribution should have been EUR 20 (i.e. the difference between the nominal value and the real economic value). The aid amount corresponds to the difference between the transfer value and the market value, and amounts to EUR 35. Of this aid amount, only the difference between the real economic value and the market value can constitute compatible aid. So, in principle, only the aid amount of EUR 30 can be authorised. The 'additional aid' of EUR 5 has to be clawed back.

In most cases, the transfer value was equal to the REV or below the REV. However, there are also some cases in which the transfer value exceeded the REV. In these cases, the Commission required a claw-back or far-reaching restructuring.

One of those cases is the case of BayernLB. The Commission recalled that a claw-back required that the bank would reimburse the entire amount above the REV covered by the guarantee; this would imply a claw-back amount of EUR 1,96 billion.[84] However, BayernLB only proposed to make six annual

83. Annex IV, para. II. of the IAC.
84. BayernLB, SA.28487, 5 February 2013, para. 147.

payments of EUR 120 million.[85] BayernLB claimed that it would not be able to pay more. However, the Commission considered that a claw-back of a nominal amount of EUR 1,96 billion in six years was feasible. According to point 41 of the IAC, a partial claw-back should be allowed only if the full claw-back would result in the technical insolvency of BayernLB. However, the Commission did not believe that a technical insolvency would happen if the claw-back payments were stretched over time, even beyond the restructuring period. The Commission considered that this would not conflict with point 41 of the IAC, which refers not to payment within a specific period but to payment 'at a later stage'. Therefore the Commission considered that the burden-sharing requirement in the IAC would be respected if a full claw-back were to be achieved over a period of six years.[86]

In some instances, a claw-back is not possible. This was the case with UNNIM Banc and Banco de Valencia. Spain had provided an Asset Protection Scheme (APS) for these banks. The Commission considered the institution of a claw-back clause incompatible with the sale of UNNIM Banc to a third party through a formalised tender procedure since the bidders would have compensated in advance the potential cost of the claw-back in demanding additional support measures in theirs offers.[87] Therefore, the capital injection element of the APS could be deemed compatible only if it was accompanied by an in-depth and far-reaching restructuring of the entity.[88] This is a manifestation of the principle that non-compliance with one of the IAC-criteria has to be compensated for by far-reaching restructuring. This principle will be explored further in section 9.10.

9.8.3 Remuneration of an asset guarantee

In exchange for an asset guarantee, the beneficiary bank has to pay a guarantee fee. This fee is the remuneration for the State aid. As was outlined in section 8.6, State aid measures should be adequately remunerated.[89] In that regard, the IAC sets out that impaired asset measures remuneration should be 'inspired' by the remuneration that would have been required for recapitalisation measures

85. As a claw-back, BayernLB would pay an additional premium of 3,75% on a part of the guarantee amounting to EUR 2 billion (i.e. EUR 75 million a year), and a special fee of EUR 45 million a year, giving a total of EUR 120 million a year for 6 years until 2015. That arrangement would amount to an annual claw-back payment of EUR 120 million.
86. BayernLB, SA.28487, 5 February 2013, para. 148-150.
87. UNNIM Banc, SA.33733, 25 July 2012, para. 132.
88. UNNIM Banc, SA.33733, 25 July 2012, para. 133. The same consideration can be found in the decision on Banco de Valencia (para. 151).
89. In one of its decisions (Parex banka, C26/2009, 15 September 2010, para. 124), the Commission noted that "The objective of requiring remuneration (including, where applicable, a claw-back) is two-fold: to ensure burden-sharing and to ensure a level playing field (i.e. minimize competition distortions).

with equivalent effects on regulatory capital.[90] The explanation can be found in footnote 1 relating to point 21 of the IAC: "Asset relief measures are somewhat comparable to capital injections insofar as they provide a loss absorption mechanism and have a regulatory capital effect".[91] There are thus two key elements: the capital relief effect and the remuneration rate.

The capital relief effect is nicely explained in the decision on KBC. The State Protection Measure reduced the RWA of KBC by EUR 6,3 billion. This amounted to a capital relief effect of EUR 504 million (i.e. 8% of 6,3 billion). Using a rate of 7%, such a capital relief effect would cost EUR 35 million (i.e. 7% of 504 million).

As regards the remuneration rate, the Commission explained in its decision on NordLB that it would accept a remuneration level of 7% on the capital relief effect:

> "In an asset guarantee scenario, it would have to be taken into consideration that in contrast to recapitalisation measures, no liquidity is provided. Using that guidance, the Commission has determined that the base remuneration for a CT1-targeted measure ought to be 10%. Because of the relatively good quality of the underlying portfolio, no additional capital remuneration would have to be foreseen. In order to distinguish between asset transfers and asset guarantees (where in the latter no liquidity is foreseen), a long-term interest rate could be deducted. The Commission's decisional practice has put that interest rate deduction at 3%".[92]

BayernLB paid 6,25% on the capital relief effect.[93] The Commission considered this to be in line with the levels approved in earlier decisions (such as LBBW).[94] In the decision on LBBW, the rate of 6,25% was explained as follows:

> "In view of the equity capital relief effect the compensation should however be reduced by 0,75% to 6,25% p.a. At least 50% of regulatory equity capital must consist of tier 1 capital. According to the current legal provisions

90. Annex IV, para. II. of the IAC.
91. Footnote 1 relating to point 21 of the IAC continues by pointing out that the State generally incurs a larger risk in the case of asset relief measures, related to a specific portfolio of impaired assets, with no direct contribution of other bank's income generating activities and funds, and beyond its possible stake into the bank. In view of the larger down-side and more limited up-side remuneration for asset relief should normally be higher than for capital injections.
92. NordLB, SA.34381, 25 July 2012, footnote 70.
93. It should be recalled that the remuneration for the risk shield for BayernLB included a claw-back payment (as described in the previous subsection). As result, the remuneration was higher than 6,25%.
94. BayernLB, SA.28487, 5 February 2013, para. 152.

> the tier 2 capital must not exceed 100% of the tier 1 capital. This means that the equity capital can consist 50% of tier 1 capital and 50% of tier 2 capital in order to meet the regulatory requirements. As according to the Recommendation of the European Central Bank of 20 November 2008 on recapitalisation measures a difference of 1,5% exists between the price of tier 1 capital and tier 2 capital, a reduction of 150 basis points is appropriate. If according to the Recapitalisation Communication 7% can be regarded as appropriate compensation for tier 1 capital without the supply of liquidity, the tier 2 capital should then be compensated for at a rate of 5,5%. The average of both rates is 6,25%".[95]

Most cases involving an asset guarantee complied with the remuneration-criterion of the IAC. By contrast, in a few cases, the guarantee fee was not adequate. For instance, in the decision on UNNIM Banc, the Commission concluded that the APS measure had not been remunerated adequately. However, the Commission noted that it is possible to accept a lower level of remuneration if it is compensated for by a thorough and *far-reaching restructuring*.[96] The principle that non-compliance with one of the IAC-criteria has to be compensated for by far-reaching restructuring was touched upon in the previous subsection and will be explored further in section 9.10.

9.8.4 Remuneration in case of an asset purchase

With respect to asset purchases, the pricing principle can be summed up as follows: the assets should be transferred at a price that matches or remains below their REV.

Interestingly, while in some cases, the Commission noted that the transfer had to take place "at a price *not higher than* the REV"[97], in several other cases, the Commission noted that the transfer price had to be "*well below* the real economic value". For instance, in the decision on Banco Mare Nostrum (BMN), the Commission noted that the assets had been fully written down to their transfer

95. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 65.
96. UNNIM Banc, SA.33733, 25 July 2012, para. 137.
97. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 94.

value, and that the transfer price was on a relative basis [50-60]% lower than their real economic value.[98] The Commission concluded the compensation for the risk of the State was embedded in the low transfer price.[99]

9.8.5 *Remuneration in case of a split-up of the bank*

Section 9.3.1 introduced the cases in which the split-up of the bank was assessed under the IAC. One of these cases was the case of Dunfermline. In the decision on Dunfermline, the Commission noted that there was no remuneration paid for the implied asset relief by the Dunfermline business transferred to Nationwide. In addition, the Commission noted that the UK State would not recuperate any benefit which the Dunfermline business transferred to Nationwide might enjoy as a result of the asset relief measure through a higher sale price of the assets, since the business had already been sold without any possibility of revising the price obtained. The Commission therefore concluded that the remuneration criterion was not met.[100] The consequences of this conclusion will be discussed in section 9.10.

9.8.6 *Concluding remarks on burden-sharing*

The current section has illustrated that burden-sharing[101] is essentially based on two elements: i) a sufficiently large write-down or first-loss tranche, and ii) an adequate remuneration. There is another element: i.e. the claw-back. However, this element is related to the other two elements. A claw-back mechanism is required when the transfer value exceeds the REV. The difference between the transfer value and REV constitutes additional aid which has to be recovered (by means of a claw-back). It should be pointed out that a transfer value exceeding the REV means that the write-down or first-loss tranche was not sufficiently large. Thus, a claw-back is needed when the first element of burden-sharing is

98. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 125.
99. The latter consideration is derived from section II of Annex IV of the AIC. In that particular section, the Commission explains that any pricing of asset relief must include remuneration for the State that takes account of the risks of future losses exceeding those that are projected in the determination of the real economic value. Such remuneration may be provided by setting the transfer price well below the real economic value to a sufficient extent so as to provide for adequate compensation for the risk in the form of a commensurate upside.
100. Dunfermline, NN19/2009, 25 January 2010, para. 78. The same considerations can be found in the decision on Quinn Insurance (SA.33023, 12 October 2011, para. 114). Also in this case, the Commission came to the conclusion that the remuneration requirement was not met.
101. It is worth stressing that the current section concerned a specific form of burden-sharing, namely burden-sharing *by the bank* with respect to *impaired assets*. The more general application of the burden-sharing principle will be discussed in chapter 12.

insufficient. This way, the claw-back is related to the first element of burden-sharing. It should also be pointed out that a claw-back can be achieved by increasing the level of remuneration. This way, the claw-back is related to the second element of burden-sharing.

9.9 Procedural aspects

Thus far, the substantive criteria of section 5 of the IAC were discussed. The IAC also gave guidelines on the procedural aspects. This was done in Annex V of the IAC and in section 5.7 of the IAC (though section 5.7 of the IAC contained nothing more than a reference to Annex V).

Annex V of the IAC provided the following: if all the criteria of section 5 of the IAC were met, the asset relief measure would be authorised for a period of 6 months, and conditional on the commitment to present either a restructuring plan or a viability review. The definitive authorisation was given in the Restructuring Decision. Just like a capital injection would be temporarily authorised by the Commission in a Rescue Decision when the measure was appropriate, necessary and proportionate, an asset relief measure would be temporarily authorised when it met the IAC-criteria. In its decisional practice, the Commission has clarified that even if not all IAC-criteria were met, asset relief measures could still be authorised for a period of 6 months.[102] However, the Commission would open the formal investigation procedure when it had doubts whether the IAC-criteria were met.

This procedure was changed by the 2013 Banking Communication. In that regard, point 95 of the 2013 Banking Communication stipulates that point 47 and Annex 5 of the Impaired Assets Communication are withdrawn. As set out in section 8.1.2, the two-stage compatibility-assessment has effectively been abandoned for a one-stage compatibility-assessment. This means that impaired asset measures are immediately assessed as restructuring aid – instead of first being temporarily approved as rescue aid. It should be stressed that the 2013 Banking Communication only changes the procedural aspects of the IAC; the substantive criteria of section 5 of the IAC remain unchanged.

102. See: ING, C10/2009, 31 March 2009, para. 85-89; Landesbank Baden-Württemberg (LBBW), C17/2009, 30 June 2009, para. 85-89.

9.10 Follow-up measures: "far-reaching restructuring"

9.10.1 The need for far-reaching restructuring

In principle, asset relief measures should satisfy the criteria of (section 5 of) the IAC. However, some cases did not satisfy all these requirements. These cases can still be compatible with the IAC, but they should then be subject to far-reaching restructuring. This follows from points 49 and 50 of the IAC, which read as follows:

> 49. Under State aid rules and notably those for rescue and restructuring aid, asset relief amounts to a structural operation and requires a careful assessment of three conditions: (i) adequate contribution of the beneficiary to the costs of the impaired assets programme; (ii) appropriate action to guarantee the return to viability; and (iii) necessary measures to remedy competition distortions.[103]
>
> 50. The first condition should normally be achieved by fulfilling the requirements set out in the Section 5, notably disclosure, valuation, pricing and burden-sharing. This should ensure a contribution by the beneficiary of at least the entirety of the losses incurred in the transfer of assets to the State. Where this is materially not possible, aid may still be authorised, by way of exception, *subject to stricter requirements* as to the other two conditions.

This principle is reiterated in points 54 ("Departure from the general principles set out in Section 5 will normally point to the need for such in-depth restructuring") and 58 of the IAC ("The need for compensatory measures will be presumed if the beneficiary bank does not fulfil the conditions set out in Section 5 and notably those of disclosure, valuation, pricing and burden-sharing"). In addition, point 41 of the IAC already stated that a transfer value that exceeds the REV can only be accepted if it is accompanied by far-reaching restructuring (in case a claw-back is not possible). Point 36 of the IAC also contained a provision that far-reaching restructuring was required when the range of assets covered by the asset relief measure was very large.

Points 36, 41 and 50 are all based on the principle that far-reaching restructuring is required when the IAC-criteria have not been met. Point 36 and 41 are specific provisions (related to specific IAC-criteria), while point 50 is a general provision (related to the IAC-criteria in general).

103. The three conditions that are mentioned in point 49 of the IAC correspond to the three pillars of the Restructuring Communication. Condition (ii) corresponds to the first pillar, condition (i) corresponds to the second pillar and condition (iii) corresponds to the third pillar.

9.10.2 How is this principle applied in the Commission decisions?

Point 50 of the IAC has been applied by the Commission in several cases. Indeed, the current chapter has discussed several cases that did not comply with all the IAC-criteria. As outlined in sections 9.7 and 9.8, the asset relief measures in the cases of Dunfermline and Quinn Insurance did not satisfy all the criteria of section 5 of the IAC. In particular, the measures did not meet the valuation requirement and the remuneration criterion. Notwithstanding the fact that the valuation and remuneration criteria were not met, the Commission concluded that these cases complied with the IAC, because they were subject to far-reaching restructuring.[104] In the case of Dunfermline, the Commission noted that "the bank was split up, with a good part containing 50% of the assets of Dunfermline sold to a new owner. Considering the size of the bank and its very limited market shares, together with the fact that the Dunfermline business transferred to Nationwide was sold in a process that closely resembled an open, transparent and unconditional tender by the UK, that level of restructuring can be considered as sufficient in this context".[105]

While point 50 of the IAC was applied in the cases of Dunfermline and Quinn Insurance, in several other cases, the need for far-reaching restructuring was based on point 41 of the IAC. As was discussed in section 9.8, point 41 of the IAC stipulates that the transfer value should not be higher than the REV. Nevertheless, there are several cases in which the transfer value exceeded the REV. The most remarkable case in this respect is the case of Hypo Real Estate (HRE). In this case, the difference between the transfer value and the REV was EUR 16.2 billion. This enormous difference called for a particularly thorough restructuring and downsizing of the bank.[106] The Commission noted that the restructuring plan included a "dramatic downsizing of the 'good' core bank, to approximately 15% of HRE's size at the end of 2008".[107]

Similarly, in the case of Banco Português de Negócios (BPN), the impaired assets were transferred at book value, thus well above the real economic value. Although the Commission acknowledged that the transfer was intended to protect BPN's viability and to allow for its sale, it considered that the transfer at book value entailed aid that was not in line with the main requirements of the IAC. "The IAC recognises that in-depth restructuring can compensate for potential misalignments with the main criteria of that Communication, including those on pricing. The existence of in-depth restructuring of BPN is an element that could allow the Commission to find that measure compatible with the

104. Dunfermline, NN19/2009, 25 January 2010, para. 86; Quinn Insurance, SA.33023, 12 October 2011, para. 118.
105. Dunfermline, NN19/2009, 25 January 2010, para. 84.
106. Hypo Real Estate (HRE), C15/2009, 18 July 2011, para. 84.
107. Hypo Real Estate (HRE), C15/2009, 18 July 2011, para. 85. See also para. 119.

Impaired Assets Communication. Thus, the transfer of assets to the SPVs could be assessed together with the rest of the measures in favour of BPN and as a part of the far-reaching restructuring".[108]

Likewise, in the decisions on UNNIM Banc, Banco de Valencia and Banco CAM (i.e. the Spanish banks that benefited from the Asset Protection Scheme (APS)), the Commission concluded that far-reaching restructuring was required, because the APS measure was not fully in line with the IAC. This conclusion was based on two reasons. Firstly, the APS did not cover only unexpected losses of the portfolio but also part of the expected losses. The Commission recalled that expected losses should be borne by the bank and not by the State. Therefore, covering expected losses can be considered compatible only if it is accompanied by an in-depth and far reaching restructuring of the entity. Secondly, the APS measure had not been remunerated adequately. However, the Commission noted that it is possible to accept that a bank pays remuneration lower than is normally necessary, provided that such lower remuneration is compensated for by a thorough and far-reaching restructuring. The Commission noted that Spain had submitted far-reaching restructuring plans for UNNIM Banc, Banco de Valencia and Banco CAM, including the change of ownership, the dissolution of the bank and its disappearance as a stand-alone entity.[109]

9.10.3 Concluding remarks

The discussion of the cases of Dunfermline, Quinn Insurance, Northern Rock, HRE, BPN, UNNIM Banc, Banco de Valencia and Banco CAM illustrates that in several cases the Commission has held that the non-compliance with the IAC-criteria would trigger the need for far-reaching restructuring. In every case in which the IAC was applicable, the Commission has either concluded that the IAC-criteria were met or that the non-compliance with the IAC-criteria would have to be compensated for by far-reaching restructuring.

9.11 Conclusion

This chapter has given an insight into how the Commission assesses asset relief measures. This assessment is based on the principles of the Impaired Assets Communication (IAC). The IAC is only applicable to asset relief measures. As set out in section 9.3.1, the Commission looks at the effect of the State aid measure: if the aid measure has the effect of an asset relief measure, then it falls within the scope of the IAC. Consequently, the fact that the measure has the

108. Banco Português de Negócios (BPN), SA.26909, 27 March 2012, para. 248.
109. Banco CAM, 30 May 2012, para. 120; UNNIM Banc, 25 July 2012, para. 136-137; Banco de Valencia, 28 November 2012, para. 156.

effect of relieving the bank from its impaired assets, is a relevant characteristic, because it means that the measure will be assessed on the basis of the IAC-criteria.

Asset relief measures are authorised by the Commission when they comply with the IAC-criteria. The fact that an asset relief measure complies with the IAC-criteria is thus a relevant characteristic. In this chapter, the relevant characteristics are presented as the fact that one of the IAC-criteria is met. For instance, the fact that the 'valuation-criterion' of the IAC has been met, is a relevant characteristic. Since there are five IAC-criteria, there are also five relevant characteristics.

Has the Commission consistently taken into account these five relevant characteristics? In other words: has the Commission consistently assessed whether the five IAC-criteria have been met? This chapter has shown that this is indeed the case. In every case that involved asset relief measures, the Commission applied the five IAC-criteria. This chapter also showed that the asset relief measures did not always meet the IAC-criteria.[110] However, these asset relief measures were still approved by the Commission, because the non-compliance with the IAC-criteria was compensated for by far-reaching restructuring.

The principle that a lack of adequate own contribution has to be reflected in the need for far-reaching restructuring will be touched upon again in the following chapter. That chapter focusses on the characteristics that are relevant to the Commission's assessment of whether far-reaching restructuring is required.

110. In particular, section 9.7.2 indicated that the valuation-criterion was not met in the cases of Dunfermline and Quinn Insurance. Section 9.8 indicated that the 'burden-sharing and remuneration-criterion of the IAC' was not met in the cases where the transfer value exceeded the real economic value. Section 9.10 provided an overview of cases that did not meet the IAC-criteria.

Chapter 10. The need for far-reaching restructuring

10.1 Introduction

One of the key observations made in the previous chapter was that non-compliance with the criteria of the Impaired Assets Communication (IAC) had to be compensated for by far-reaching restructuring (also referred to as in-depth restructuring[1]). Also outside the context of the IAC, there are factors that point at the need for far-reaching restructuring. Indeed, in several decisions, the Commission explicitly considered *that far-reaching restructuring was required*. This observation raises the question: when is far-reaching restructuring needed (and why)?

10.1.1 The concept of "far-reaching restructuring"

It is worth stressing that "far-reaching restructuring" is not a clearly defined concept. The concept of "far-reaching restructuring" is also difficult to pinpoint in relation to the restructuring objectives. It should be recalled that restructuring is aimed at three objectives: i) restoring long-term viability of the beneficiary bank, ii) burden-sharing, and iii) limiting distortions of competition. Consequently, there are three types of restructuring measures: viability-measures, burden-sharing measures and compensatory measures. Sometimes, "far-reaching restructuring" appears to be used as an overall term for these three types of restructuring measures. And sometimes, the degree of restructuring seems to be related to a specific restructuring objective. For instance, in the decision on Ethias, the Commission considered that "(…), it is obvious that Ethias requires in-depth restructuring *to return to long-term viability*".[2] Consider also the following recital from the decision on T Bank: "The absence of remuneration triggers the need for in-depth restructuring, *both in terms of viability measures and in terms of measures to limit distortion of competition*".[3]

1. In the bank State aid decisions, the terms "far-reaching restructuring" and "in-depth restructuring" are used interchangeably.
2. Ethias, N256/2009, 20 May 2010, para. 104.
3. T Bank, SA.34115, 16 May 2012, para. 55.

That "far-reaching restructuring" is difficult to pinpoint also follows from the structure of the Commission decisions. Every Restructuring Decision contains a section in which the compatibility of the State aid is assessed on the basis of the three restructuring objectives. Some decisions also contain a preceding section that specifically addresses the degree of restructuring required. For instance, section 5.2.1 of the Restructuring Decision on Ethias was titled "Degree of restructuring required". Likewise, the Restructuring Decisions in the cases of the four large Greek banks contain a section titled "Sources of difficulties and consequences on the assessment under the Restructuring Communication".[4] Interestingly, such sections are not found in every decision. In most cases, the Commission's assessment of the need for far-reaching restructuring forms part of the compatibility-assessment (rather than being a preliminary assessment). In many cases, the need for far-reaching restructuring seems to point at the need for compensatory measures.

Even though "far-reaching restructuring" is not clearly defined by the Commission, the fact remains that the Commission concluded in several cases that far-reaching restructuring was needed. Since this conclusion influenced the Commission's assessment of the viability, burden-sharing and competition distortions, it is important to analyse the characteristics that were relevant to that conclusion.

10.1.2 Structure of this chapter

The current chapter discusses characteristics that are relevant to the assessment of the degree of restructuring required. The degree of restructuring depends primarily on i) the aid amount, and ii) the question whether the bank's difficulties were caused by endogenous problems or by external factors. The fact that the aid amount is high (or the opposite: that it is low) and the fact that the bank's difficulties were caused by endogenous problems (or the opposite: caused by external factors) are thus relevant characteristics. These characteristics will be discussed in sections 10.3 and 10.5. In addition, far-reaching restructuring may be needed to compensate for a lack of own contribution. This will be the topic of section 10.4.

The chapter thus focusses on the question whether far-reaching restructuring is required. There is, however, a preceding question: i.e. the question whether a restructuring plan is required. Indeed, the degree of restructuring only becomes relevant when the beneficiary bank has to undergo restructuring in the first place. Although the Member State is usually obliged to submit a

4. Ethias, N256/2009, 20 May 2010, para. 101-104.

restructuring plan to the Commission for the beneficiary bank, a restructuring plan is not required in every bank State aid case. The question whether a restructuring plan is required will be discussed in section 10.2.

10.2 Requirement to submit a restructuring plan

* *The fact that the beneficiary bank is fundamentally sound./The fact that the beneficiary bank is distressed.*

10.2.1 Introduction

In most bank State aid cases, a restructuring plan was required: within a certain time period, the Member State had to submit to the Commission a restructuring plan for the beneficiary bank. However, there are also some bank State aid cases in which a restructuring plan was not required.[5]

Whether a restructuring plan is required depends on three factors: i) the type of State aid measure, ii) the question whether the aid was granted under a scheme or as ad hoc aid, iii) the Communications that were in force at the moment the aid was granted to the bank.

Subsection 10.2.2 will discuss whether a restructuring plan is needed in case of an ad hoc recapitalisation measure or an ad hoc asset relief measure, while subsection 10.2.3 will discuss the need to submit a restructuring plan in case of a recapitalisation scheme, asset relief scheme and guarantee scheme.[6] In both subsections, the impact of the Communications on the need to submit a restructuring plan will be discussed. In addition, the tables in Annex IV provide an overview of the compatibility-assessment and indicate in which instances a restructuring plan is required.

5. The article by Bomhoff, Jarosz-Friis & Pesaresi (2009) is very useful in that regard: this article provides seven scenarios to illustrate in which instances a restructuring plan is required. It should, however, be noted that this article was written in 2009, so before the adoption of the First Prolongation Communication and the 2013 Banking Communication.
6. The need to submit a restructuring plan *in case of an ad hoc guarantee* will not be discussed, for the following two reasons. First, guarantees are almost always granted in the context of a guarantee scheme. And second, in the rare cases that a bank benefited from an ad hoc guarantee, the bank also benefited from other State aid measures and a restructuring plan was already required.

10.2.2 Ad hoc recapitalisation measures and ad hoc asset relief measures

The question whether a restructuring plan was required when a bank benefited from a recapitalisation measure or asset relief measure, hinged on the question whether the beneficiary bank was fundamentally sound or distressed. Member States did not have to submit a restructuring plan for banks that were fundamentally sound. Conversely, Member States had to submit a restructuring plan (within six months of the recapitalisation) for banks that were considered not to be fundamentally sound by the Commission.[7] For fundamentally sound banks, a viability review – sometimes referred to as a viability plan[8] – sufficed.

The aid intensity[9] was used as an indicator to distinguish between fundamentally sound and distressed banks. In the Recapitalisation Communication, the Commission introduced a threshold of 2% to differentiate between fundamentally sound and distressed banks. If the aid received was more than 2% of the bank's risk weighted assets (RWA), then the bank was deemed as distressed and had to submit a restructuring plan. The fact that the bank is fundamentally sound was therefore a very relevant characteristic.[10]

The distinction between fundamentally sound banks and distressed banks was introduced in the 2008 Banking Communication. In the 2008 Banking Communication, the link between this distinction and the requirement to submit a restructuring plan was formulated quite tentatively.[11] The Recapitalisation Communication was much more clear on the question whether a restructuring

7. See for instance: Polish recapitalisation scheme, N302/2009, 21 December 2009, para. 24; Lithuanian recapitalisation scheme, N200/2009 and N47/2010, 5 August 2010, para. 56; Hungarian bank support scheme, N664/2008, 12 February 2009, para. 55. NB: in addition, banks that are considered not fundamentally sound have to pay a higher remuneration. See, for instance, the Finnish scheme.
8. A viability review is sometimes referred to as viability *plan*. Gilliams (2010, p. 287) argue that the term 'plan' captures the essence better than the term 'review', since the viability plan must contain measures that restore the bank's viability.
9. The aid intensity is the relative amount of aid; i.e. the aid amount expressed as a percentage of the bank's risk weighted assets (RWA).
10. However, according to Psaroudakis (2012, p. 204), the practical difference between restructuring plans and viability plans was limited.
11. The last indent of point 35 of the 2008 Banking Communication reads as follows: "the requirement for recapitalisation as an emergency measure to support the financial institution through the crisis to be followed up by a restructuring plan for the beneficiary to be separately examined by the Commission, taking into account both the distinction between fundamentally sound financial institutions solely affected by the current restrictions on access to liquidity and beneficiaries that are additionally suffering from more structural solvency problems linked for instance to their particular business model or investment strategy and the impact of that distinction on the extent of the need for restructuring"

plan was required. Section 2.1 of the Recapitalisation Communication dealt solely with fundamentally sound banks, while section 2.2 concerned banks which are not fundamentally sound. Only the latter were required to submit a restructuring plan. When a fundamentally sound bank fell into difficulties after recapitalisation has taken place, a restructuring plan had to be notified.[12]

With respect to insurance companies, there was a complicating factor: unlike the regulatory capital of banks, regulatory capital of *insurance companies* is not defined in terms of RWA.[13] Consequently, the aid amount cannot be expressed as a percentage of the RWA. The Commission came up with the following solution: since 2% of RWA represented a quarter of the minimum capital requirements for banks, the Commission would take 25% of the minimum solvency margin requirements as a relevant proxy for the 2% RWA benchmark.[14]

In its decisional practice, the Commission consistently assessed whether the beneficiary bank could be considered fundamentally sound.[15] There is an interesting case that is worth mentioning: the case of Natixis.

Natixis was the main subsidiary of the BPCE group, i.e. the banking group that resulted from the merger of Banque Populaire (BP) and Caisse d'Epargne (CE) in July 2009. In 2008/2009, BPCE received a capital injection from the French State. The Commission observed that most of the State aid to BPCE was used to recapitalise Natixis. The Commission therefore concluded that Natixis was the indirect recipient of most of the State aid.

The amount of aid received by Natixis exceeded 2% of its RWA. However, as compared to the RWA of the entire BPCE group, the aid amounted to 1,6% of BPCE's RWA, thus below the indicative limit of 2%. An important aspect of this case was that Natixis was not a wholly-owned subsidiary: before the merger, BP and CE each held 35% of the shares in Natixis, while the other 30% of Natixis' share capital was floated on the stock market. The Commission therefore analysed whether Natixis constituted a separate banking group or whether it should be considered as an integral part of the newly created BPCE group. In that regard, the Commission considered that the newly created BPCE

12. This follows from point 42 of the Recapitalisation Communication.
13. Their minimum capital requirements are defined in terms of minimum solvency margin requirements, where the available capital defined as the available solvency margin must be at least equal to the minimum solvency margin requirements.
14. Ethias, N256/2009, 20 May 2010, para. 103. See also: Aegon, N372/2009, 17 August 2010, para. 94.
15. Which beneficiary banks were fundamentally sound? In the Rescue Decision on Hypo Tirol (17 June 2009, para. 39), the Commission concluded that Hypo Tirol could be considered a sound bank, since the capital injected was below 2%. Also in the case of SNS REAAL (2008), the aid amount was below 2% of RWA.

group would own 70% of Natixis and that Natixis would be totally consolidated in the new group's accounts. The Commission concluded that the aid must be treated as aid allocated to the BPCE group, rather than as aid granted to Natixis taken in isolation from its parent companies.[16]

The Commission then analysed whether BPCE was fundamentally sound. In line with Annex 1 of the Recapitalisation Communication, the Commission took into account BPCE's capital adequacy, its CDS spread and its rating. In addition, the Commission took into account the fact that the aid amount was only 1,6% of BPCE's RWA.[17] Based on these elements, the Commission concluded that the beneficiary bank was fundamentally sound. The case of Natixis is thus illustrative of the importance that the Commission attached to the 2%-threshold as an indicator to distinguish between fundamentally sound and distressed banks.

In December 2010, the Commission adopted the First Prolongation Communication.[18] The First Prolongation Communication removed the distinction between fundamentally sound banks and distressed banks. As a result, for every recapitalisation measure or impaired asset measure taken after 1 January 2011, a restructuring plan had to be submitted, irrespective of whether the beneficiary bank was fundamentally sound or distressed. This means that the 2%-threshold has lost its relevance after 1 January 2011. For instance, when Nova Ljubljanska banka (NLB) was recapitalised in March 2011, the capital injection amounted to 1,6% of NLB's RWA and the Slovenian State had to submit a restructuring plan. In its decision, the Commission noted that prior to 1 January 2011, this capital injection would most likely not have triggered the requirement to submit a restructuring plan.[19]

10.2.3 Bank support scheme

Banks that benefit from State aid under a bank support scheme[20] did not always have to submit a restructuring plan. In which instances was a restructuring plan required? This question will be answered in the current section.

10.2.3.1 Recapitalisation schemes

Before the adoption of the First Prolongation Communication, the determining factor was whether the bank was fundamentally sound or distressed.

16. Banque Populaire & Caisse d'Épargne (BPCE), N249/2009, 8 May 2009, para. 41.
17. Banque Populaire & Caisse d'Épargne (BPCE), N249/2009, 8 May 2009, para. 48.
18. The First Prolongation Communication was discussed in section 3.4.1.5.
19. Nova Ljubljanska banka (NLB), SA.32261, 7 March 2011, para. 59.
20. It should be recalled that when the Commission authorises a bank support scheme, this authorisation is restricted to six months and any extension of the scheme must be notified to the Commission. Also any amendment to the scheme must be notified to the Commission.

It should be recalled that some bank support schemes were only open to fundamentally sound banks.[21] For instance, as discussed in section 8.10.1, the Swedish recapitalisation scheme was exclusively aimed at banks that were fundamentally sound. However, even though these schemes were aimed at fundamentally sound banks, if the Commission considered that the bank in question was not fundamentally sound, a restructuring plan for that bank had to be submitted to the Commission. Furthermore, many recapitalisation schemes provided for the following: if a bank that was initially considered fundamentally sound would fall into difficulties after recapitalisation had taken place, a restructuring plan for that bank had to be notified.[22]

A special feature could be found in the original recapitalisation schemes of Germany, Greece and the UK.[23] With respect to these schemes, the Commission did not require a restructuring plan if the beneficiary bank had redeemed the State's stake within six months or if the bank committed to do so in the next six months.[24] These schemes were, however, set up before the adoption of the Recapitalisation Communication. Once this Communication was adopted, the Member States notified amendments of the schemes to the Commission. The amendment entailed that participating banks that were fundamentally sound did no longer need to provide a restructuring plan; instead, they had to provide a viability review.[25] The Commission accepted this amendment, since it was in line with the Recapitalisation Communication.

As explained in the section 10.2.2, after the adoption of the First Prolongation Communication, a restructuring plan is required for distressed banks as well as for fundamentally sound banks. All prolongations of recapitalisation schemes (notified after the introduction of the First Prolongation Communication) took into account this new guidance. For instance, in the fourth prolongation of the Hungarian scheme, Hungary committed to submit a restructuring plan for any bank which would benefit from a recapitalisation after 31 December 2010, independently of whether the beneficiary was considered to be fundamentally sound or distressed.[26] This commitment was welcomed by the Commission.

21. In these cases, the Commission usually noted that the scheme was "targeted at the appropriate beneficiaries".
22. This requirement also follows from point 42 of the Recapitalisation Communication.
23. UK bank support scheme, N507/2008, 13 October 2008, para. 54; Greek bank support scheme, para. 63; German bank support scheme, para. 20-21.
24. The Commission added that this was in line with the R&R-guidelines.
25. Greek bank support scheme (prolongation/amendment), N504/2009, para. 15 and 27.
26. See, for instance: Hungarian bank support scheme (prolongation), N536/2010, 7 December 2010, para. 23 and 25.

The 2013 Banking Communication had an impact on the possibilities to set up recapitalisation schemes. As explained in section 8.1.2, the 2013 Banking Communication largely abandoned the two-stage compatibility-assessment. Under this two-stage compatibility-assessment, recapitalisation measures were temporarily authorised (in case the scheme was appropriate, necessary and proportionate), while the individual assessment took place when a restructuring plan was submitted. Following the 2013 Banking Communication, recapitalisation measures could only be authorised after the Commission had approved the restructuring plan. Since the authorisation is thus dependent on the approval of a restructuring plan for each individual bank, recapitalisation schemes are no longer possible.[27] There is, however, an exception for small banks.[28] Since aid to small banks tends to affect competition less than aid granted to larger banks, the Commission is willing to authorise schemes for recapitalisation and restructuring of small[29] banks. An example of a scheme based on point 54 of the 2013 Banking Communication is the ‘Restructuring and stabilisation scheme for the Credit Union Sector in Ireland’.[30]

10.2.3.2 Guarantee schemes

In the context of a guarantee scheme, the Member States – as a general rule – commit to submit a restructuring plan to the Commission for any bank that causes the guarantee to be drawn.[31] In other words: when a bank defaults on its liabilities and calls upon the guarantee, the Member State has to submit a restructuring plan for the bank in question.

With respect to guarantee schemes, there have been two important policy developments. Firstly, the DG Competition Staff Working Document of 30 April 2010 introduced the requirement to submit a *viability review* in case a new

27. The causal link between the changed approach towards the two-stage compatibility-assessment and the possibility to set up recapitalisation schemes is not made explicit in the 2013 Banking Communication. It is, however, observed in the literature; for instance by Flynn (2014, p. 678) who speaks of a “logical consequence”.
28. Point 54 of the 2013 Banking Communication.
29. When is a bank ‘small’ in the sense of this provision? Point 54 of the 2013 Banking Communication clarifies that schemes for small banks should be limited to banks with a balance sheet total of not more than EUR 100 million. In addition, the sum of the balance sheet totals of the banks that receive aid under the scheme must not exceed 1,5% of the total assets held by banks in the domestic market of the Member State concerned.
30. See: Restructuring and stabilisation scheme for the Credit Union Sector in Ireland, SA.36262, 16 October 2014.
31. Swedish bank support scheme, N533/2008, 29 October 2008, para. 49. Polish bank support scheme, N208/2009, 25 September 2009, para. 49.

guarantee was granted when the total amount outstanding guaranteed liabilities exceeded both a ratio of 5% of total liabilities and the total amount of EUR 500 million.[32] This viability review had to be submitted within 3 months from the granting of the guarantee.

Secondly, the 2013 Banking Communication introduced the requirement to submit a *restructuring plan*, in case a new guarantee is granted when the total amount outstanding guaranteed liabilities exceeds both a ratio of 5% of total liabilities and the total amount of EUR 500 million.[33] This restructuring plan had to be submitted within 2 months form the granting of the guarantee. The Member States that decided to prolong their guarantee schemes had to take into account these new requirements. For instance, the notification of the eighth extension of the Polish bank guarantee scheme included the commitment to submit a restructuring plan within 2 months in case the two thresholds (of 5% and of EUR 500 million) were met.[34]

10.2.3.3 Other bank support schemes

In its decision on the Danish Compensation Scheme, the Commission approved the application of the scheme to banks with a balance sheet below EUR 3 billion. For larger banks (i.e. banks with a balance sheet of more than EUR 3 billion), an individual application was required.[35] This is in line with points 83-86 of the 2013 Banking Communication. Point 84 provides that orderly liquidation schemes for banks of limited size can be approved, "provided they are well designed so as to ensure compliance with the requirements on burden-sharing by shareholders and subordinated debt-holders set out in point 44 and to remove moral hazard and other competition concerns". Point 86 clarifies when a bank is 'of limited size': aid measures with total assets of more than EUR 3000 million must be individually notified for approval.

Under the Lithuanian asset relief scheme, Lithuania committed to provide restructuring plans for all beneficiaries of the asset relief measure which require in-depth restructuring pursuant to Section 6 of the IAC and viability plans for all others (including information regarding valuation in both cases) within three months from the beneficiary's accession to the scheme.[36]

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32. See, for an example of this new requirement: Lithuanian bank support scheme, N200/2009 and N47/2010, 5 August 2010, para. 58.
33. Pursuant to Point 59(d) of the 2013 Banking Communication.
34. Polish scheme (SA.36965, 23 July 2013, para. 8 and Annex II).
35. Danish compensation scheme, SA.33001-B, 1 August 2011, para. 36.
36. Lithuanian bank support scheme, N200/2009 and N47/2010, 5 August 2010, para. 51.

10.2.4 Failure to submit a restructuring plan

The Commission approach before the adoption of the 2013 Banking Communication can be summarised as follows: rescue aid is declared compatible for a period of six months, under the condition that the Member State submits a restructuring plan (or liquidation plan) within those six months. The commitment to present a restructuring plan is therefore essential. In almost every case, Member States have complied with their commitment to submit a restructuring plan. There is one notable exception; that is the case of Banco Privado Português (BPP).

On 5 December 2008, Portugal notified to the Commission a State aid measure in favour of BPP. Although Portugal had committed to submit a restructuring plan for BPP within six months (so before 5 June 2009)[37], it failed to do so. As a result, the aid became unlawful since 6 June 2009. Moreover, since the restructuring plan was essential to the compatibility of the State aid measure[38], the failure to submit such a restructuring plan resulted in the aid measure being incompatible. As was explained in section 5.8, BPP started legal proceedings at the Court of Justice.

According to BPP, the Commission had concluded that the guarantee was incompatible with the internal market on the basis of non-compliance *on purely procedural grounds*, namely the fact that the Portuguese Republic did not submit a restructuring plan for BPP within the six-month period laid down in the Decision of 13 March 2009. BPP therefore argued that the Commission had failed to assess whether the aid in question was intended to remedy a serious disturbance in the economy of the Member State concerned, within the meaning of Article 107(3)(b) TFEU.[39]

However, the Court held that, contrary to what was claimed by BPP, the temporal limitation of aid granted in the form of a State guarantee and the obligation to notify any subsequent extension of that guarantee, as well as the obligation resting on the beneficiary of that guarantee to submit a restructuring plan *are not mere formal requirements, but rather necessary conditions for that aid to be declared compatible with the internal market* and means of ensuring that the emergency aid granted to an undertaking in difficulty does not go beyond what is necessary to achieve the common-interest objective concerned, which consists, in the present case, in preventing a serious disturbance in the national economy.[40]

37. Banco Privado Português (BPP), NN71/2008, 13 March 2009, para. 44.
38. As the Commission explained in its Opening Decision (C33/2009, 10 November 2009, para. 39), the commitment to submit a restructuring plan was especially important in the case of BPP, because the remuneration that BPP paid for the State aid was quite low.
39. C-667/13, para. 68.
40. C-667/13, para. 74.

As indicated before, chapter 5 provides some further backgrounds to this case. In the context of the current chapter, the key feature of the case of BPP is that it underlines the importance of submitting a restructuring plan.

10.2.5 Concluding remarks

Following the First Prolongation Communication, every bank which benefited from a new recapitalisation or an impaired asset measure has to submit a restructuring plan. Thus, the question whether a restructuring plan is needed no longer depends on whether the bank is fundamentally sound or distressed. From that perspective, it could be argued that the fact that the beneficiary bank is fundamentally sound has lost its relevance. However, the fact that the beneficiary bank is (or is not) fundamentally sound is still a relevant characteristic. While it is true that the characteristic is no longer relevant to the requirement to submit a restructuring plan, it can still be relevant to the question *how much restructuring is needed*. A bank that is not fundamentally sound most likely needs more far-reaching restructuring measures to return to viability than a sound bank. The assessment of the degree of restructuring required (and the characteristics that are relevant to that assessment) are discussed in the following sections.

10.3 Far-reaching restructuring needed? (I): amount of aid

* *The fact that the aid amount is very large./The fact that the aid amount is relatively low.*

Some Restructuring Decisions contain a section entitled "Amount of aid". This section is (usually) placed after the assessment of the existence of aid and before the compatibility-assessment. As a general rule, a high aid amount will result in the conclusion that far-reaching restructuring is needed.[41] Usually, the aid amount is mentioned in relation to the need for compensatory measures (i.e. measures aimed at limiting the competition distortions arising from the State aid). For this reason, the relevance of the aid amount will be discussed in more detail in section 13.2.

41. See, for instance: Bank of Ireland, SA.33443, 20 December 2011, para. 106: "That aid amount further confirms the need for in-depth restructuring and *gives an indication of the extent of the restructuring required*." See also CCM, 29 June 2010, para. 136: "Given that the beneficiaries have received a considerable amount of aid a *far-reaching restructuring* is needed." See also Nova Ljubljanska banka (NLB), SA.32261, 7 March 2011, para. 60: "As a general rule, the more significant the reliance on State aid, the stronger the indication of a need to undergo in-depth restructuring in order to ensure long-term viability."

Related to the amount of aid is the issue of *repeated (rescue) aid*. There are some banks that repeatedly received State aid. One of those banks is Alpha Bank, one of the four large Greek banks. In May 2009, this bank received a capital injection under the Greek recapitalisation scheme.[42] It also benefited from aid measures under the Greek guarantee scheme and the Greek bond loan scheme.[43] In 2012, Alpha Bank received a bridge recapitalisation by the HFSF. In the Opening Decision on Alpha Bank, the Commission noted that the HFSF bridge recapitalisation came after prior recapitalisations and liquidity aid. The Commission concluded that the repeated rescue aid to Alpha Bank could not be considered as genuine rescue aid, and that consequently, the repeated aid should be scrutinised in more depth.[44] The Commission went on to observe that “more safeguards should be required, taking inspiration from what is required for restructuring aid”.[45]

Similarly, in the decision on National Bank of Greece, the Commission considered that “the context of a protracted rescue period blurs the distinction between rescue aid – which is normally temporarily approved without the Commission seeking many commitments from the Member State restraining the beneficiary's actions during the rescue period – and restructuring aid which is approved only after a thorough assessment”.[46]

The decisions on the Greek banks are special in the sense that they elaborate on the repeated nature of the state interventions. Normally, the amount of aid and the repeated nature are bracketed together – as is illustrated by the following recital:

> “*Given the scale and repeated nature* of the state interventions in favour of KBC, the Commission concludes that an in-depth restructuring plan is required”.[47]

For this reason, the issue of repeated rescue aid will not be discussed separately, but only in the context of the amount of aid.

42. Alpha Bank, SA.34823, 27 July 2012, para. 37.
43. Alpha Bank, SA.34823, 27 July 2012, para. 39.
44. Alpha Bank, SA.34823, 27 July 2012, para. 59.
45. Alpha Bank, SA.34823, 27 July 2012, para. 70.
46. National Bank of Greece (NBG), SA.34824, 27 July 2012, para. 61.
47. KBC, C18/2009, 30 June 2009, para. 72.

10.4 Far-reaching restructuring needed? (II): lack of adequate own contribution

(*) The fact that the remuneration is inadequate./The fact that the own contribution is inadequate.

As was explained in the previous chapter, non-compliance with one of the IAC-criteria triggers the need for far-reaching restructuring. In particular, point 41 of the IAC stressed that a transfer value above the real economic value (REV) could only be accepted if accompanied by far-reaching restructuring. It should be recalled that setting the transfer value below the REV ensures that the bank bears the losses associated with the impaired assets to the maximum extent. This is known as 'burden-sharing' or as the 'own contribution' by the beneficiary bank. A transfer value that exceeds the REV means that there is insufficient burden-sharing. This can only be accepted if it is compensated for by far-reaching restructuring.

The principle that a lack of adequate own contribution has to be compensated for by far-reaching restructuring is also applicable outside the context of the IAC. Indeed, it is not only enshrined in the IAC; it can also be found in the other Communications. For instance, point 25 of the Restructuring Communication sets out that any derogation from an adequate burden-sharing ex ante which may have been exceptionally granted in the rescue phase for reasons of financial stability should be compensated for by a further contribution at a later stage of the restructuring, for example in the form of claw-back clauses and/or by farther-reaching restructuring including additional measures to limit distortions of competition.[48]

This also follows from point 31 of the Restructuring Communication which stipulates that the Commission will take into account the extent of the beneficiary bank's own contribution, when assessing the need for compensatory measures. The relation between the own contribution and the need for compensatory measures is formulated as follows: "Generally speaking, where there is greater burden sharing and the own contribution is higher, there are fewer negative consequences resulting from moral hazard. Therefore, the need for further measures is reduced".[49]

48. See also: Banco Portugues de Negocios (BPN), SA.26909, 27 March 2012, para. 249.
49. Point 31 of the Restructuring Communication.

With respect to recapitalisation measures, points 15 and 44 of the Recapitalisation Communication explain that in duly justified cases, a lower remuneration can be accepted in the short-term for distressed banks on the condition that the lower remuneration will be reflected in the restructuring plan.[50] This can be illustrated by the following recital:

> "As regards the remuneration for that measure, the Commission has accepted that a distressed bank may pay a lower remuneration than what would normally be necessary if such a discount is required to ensure financial stability and is accompanied by the presentation of a thorough and far-reaching restructuring plan, including a change in management and corporate governance where appropriate. In the case of BVA, the Commission notes that Spain has submitted a far-reaching restructuring plan, including the change of ownership and BVA's disappearance as a stand-alone entity. Therefore, the Commission considers that the absence of remuneration for the recapitalisation measure can be accepted".[51]

In short, an inadequate remuneration triggers a need for in-depth restructuring. This principle is applied in several cases.[52] In conclusion, the lower the degree of own contribution, the more far-reaching restructuring is required. This could indicate that own contribution and the other restructuring measures are 'communicating vessels'.[53]

As was outlined in section 8.6, the Commission has always assessed whether the remuneration was adequate. In the context of the current chapter, the following observation can be made. The assessment whether the remuneration is adequate includes the assessment whether an inadequate remuneration should

50. Point 15 of the Recapitalisation Communication provides that "it may be necessary, in duly justified cases, to accept lower remuneration in the short term for distressed banks, on the assumption and condition that in the longer term the costs of public intervention in their favour will be reflected in the restructuring necessary to restore viability and to take account of the competitive impact of the support given to them in compensatory measures".
51. Banco de Valencia, SA.34053, 28 November 2012, para. 127.
52. This principle is applied in: BayernLB/HGAA, 23 December 2009, para. 59-60; Ethias, 12 February 2009, para. 75; HSH Nordbank, 29 May 2009, para. 45; T Bank, 16 May 2012, para. 53 and 55; TT Hellenic Postbank, 2013, para. 77 and 102; Anglo/INBS, 2011, para. 135-136; Bank of Ireland, 11 July 2011, para. 79-81; AIB/EBS, 2011, para. 78; Banco de Valencia, 2012, para. 127; Caja Castilla-La Mancha, 29 June 2010, para. 174-190; Banco Gallego, 25 July 2013, para. 103;
53. The term "adequate substitute" in the consideration of the Commission that the amount of downsizing was an adequate substitute for the lack of adequate own contribution (HRE, C15/2009, 18 July 2011, para. 120), confirms that they are 'communicating vessels'. The term 'communicating vessels' was used in the Commission Staff Working Paper (p. 32).

be compensated for by far-reaching restructuring. Thus, although the fact that the remuneration is inadequate is a relevant characteristic, it is not separately assessed by the Commission. Indeed, in every case, the Commission either concluded that the remuneration was adequate or concluded that the low level of remuneration had to be compensated for by far-reaching restructuring.

10.5 Far-reaching restructuring needed? (III): cause of the bank's difficulties

(*) The fact that the bank's difficulties are caused by external factors./The fact that the bank's difficulties are caused by internal factors.

10.5.1 Introduction

The cause of the bank's problems can have a clear impact on the need for far-reaching restructuring. The fact that the bank's difficulties are caused by external factors can be a mitigating factor in the sense that less restructuring is required. A manifestation of this general principle is the "proportionate assessment" which was introduced by the Second Prolongation Communication; this will be discussed in subsection 10.5.2. The general principle itself will be discussed in subsection 10.5.3.

10.5.2 "Proportionate assessment" under the Second Prolongation Communication

The Second Prolongation Communication was adopted in December 2011 and it is the sixth Communication of the Crisis Framework.[54] As the name of the Second *Prolongation* Communication indicates, it extended the temporal scope of the Crisis Framework. In addition – and in the context of the current chapter: more importantly – the Second Prolongation Communication introduced the so-called "proportionate assessment".

A proportionate assessment means that the Commission will lighten its requirements as regards restructuring. For instance, in the decision on Alpha Bank, the Commission noted that "as the aid measures are less distortive, the measures taken to limit distortions of competition should therefore be *proportionately softened*".[55]

54. The Crisis Communications were discussed in section 3.4.1.
55. Alpha Bank, SA.34823, 9 July 2014, para. 263.

The introduction of the proportionate assessment by the Second Prolongation Communication should be seen in the context of the sovereign debt crisis of 2011. Growing tensions on the sovereign debt markets lead to problems on the bank funding markets. At the Euro Summit of 26 October 2011, the EU Heads of State or Government agreed on several issues (such as the governance structure of the euro area, the stability mechanisms (EFSF) and the PSI[56] in Greece).[57] In addition, a 'banking package' was adopted, which required a capitalisation of banks: by 30 June 2012, a capital ratio of 9% of the highest quality capital[58] should be attained after accounting for market valuation[59] of sovereign debt exposures.

As a reaction to the sovereign debt crisis, the Second Prolongation Communication introduced a proportionate assessment of restructuring plans.[60] Because of the tensions in sovereign debt markets, even banks with a viable business model might require State aid in the form of capital injections. The Second Prolongation Communication stresses that also with respect to those banks, a restructuring plan is required.[61] However, pursuant to point 14 of the Second Prolongation Communication, the Commission will undertake a proportionate assessment of the viability of those banks, "taking full account of elements indicating that banks can be viable in the long term without the need for significant restructuring". The following three conditions have to be met:

1) the capital shortage is essentially linked to a confidence crisis on sovereign debt;
2) the capital injection is limited to the amount necessary to offset losses stemming from marking European sovereign bonds to market;
3) the bank in question did not take excessive risk in acquiring sovereign debt.

56. Private Sector Involvement.
57. Statement of EU Heads of State or Government of 26 October 2011.
58. i.e. Core Tier 1 capital.
59. More specifically, this means that prudential filters on sovereign debt in the Available-for-Sale portfolio should be removed and that the sovereign debt in the Held-to-Maturity portfolio and Loans and receivables portfolio should be valuated according to current market prices. See: EBA, 'Capital buffers for addressing market concerns over sovereign exposures; Methodological note', 26 October 2011.
60. Point 14 of the Second Prolongation Communication. In the 2013 Banking Communication (point 9), it is reiterated that the Commission will undertake a proportionate assessment of the long-term viability of banks where the need for State aid stems from the sovereign crisis and is not a result of excessive risk-taking.
61. Pesaresi & Mamdani (2012) welcome this approach, since not requiring restructuring plans would endanger consistency between banks that were recapitalised at different stages of the crisis.

In which decisions did the Commission apply a proportionate assessment?

In total, the proportionate assessment was applied in 8 cases. Two of them related to Portugal (CGD and BPI), four of them related to Greece (Eurobank, Alpha Bank, NBG and Pireaus Bank), one to Italy (MPS) and one to Germany (NordLB). In addition, the proportionate assessment was mentioned in the decision on BayernLB (5 December 2013, para. 189).[62]

The decisions on the Portuguese banks CGD and BPI were adopted on 24 July 2013. Interestingly, on 30 August 2013 (so only one month later), in the decision on another Portuguese bank – Banco Comercial Português (BCP) –, the Commission did not investigate whether a proportionate assessment should be taken.

How are the three criteria elaborated in the decisions?

The difficulties faced by Greek banks came mainly from the Greek sovereign crisis and the deep recession in Greece. The Commission noted that the capital needs of the Greek banks stemmed mainly from the participation in the PSI programme and not from the mismanagement or excessive risk-taking from existing investors. In its decision on Piraeus Bank and in its decision on Eurobank and in its decision on NBG, the Commission noted that the bank's exposure to the sovereign risk of its domestic country was *larger* than the exposure of other banks in Greece.[63] As a result, not all the losses on GGBs (the loss on the PSI programme) could be attributed to the regular exposure of a financial institution to the sovereign risk of its domestic country. By contrast, in the case of Alpha Bank, the Commission noted that the bank's exposure to the sovereign risk of its domestic country was *smaller* than the exposure of other banks in Greece.[64] Consequently, this bank cannot be considered to have accumulated an excessive exposure to sovereign debt.

The proportionate assessment was applied in two Portuguese cases. The Commission considered that Caixa Geral de Depositos (CGD) and Banco BPI met the three criteria. As a result, the Commission undertook a proportionate assessment.[65] With respect to the second criterion, the Commission noted that

62. "However, it should be noted that if regulatory capital requirements were in future to go substantially beyond the level envisaged in this Decision, the Commission might have to conduct a proportionate assessment of the kind indicated in the third sentence of point 14 of the Commission Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis (60); this might possibly necessitate only a limited additional measure of restructuring."
63. Piraeus Bank, SA.34826, 23 July 2014, para. 321; National Bank of Greece (NBG), SA.34824, 23 July 2014, para. 370.
64. Alpha Bank, SA.34823, 9 July 2014, para. 263.
65. Caixa Geral de Depositos (CGD), 24 July 2013, para. 55-58.

the capital needs were not directly caused by the impact of marking sovereign bonds to market. However, the underlying reason was comparable, because EBA required banks to establish a 'sovereign buffer'. This is a buffer related to the amount of sovereign bonds held on the balance sheet. [66] As a consequence of the requirement to establish this sovereign buffer, the minimum capital requirements increased.

With respect to the third criterion, the Commission noted that the sovereign debt was acquired by doing carry trade transactions. The Commission added that although under certain circumstances, such transactions could be considered as above-average risk-taking, the acquired bonds represented eligible collateral and the relevant rating notations were well above investment grade (AA- for Portugal).[67]

In the case of the Italian bank MPS, the Italian State argued that the State aid to MPS should be subject to a proportionate assessment.[68] The Commission considered that the first two criteria were met. The capital shortfall of MPS was identified following the EBA "EU capital exercise".[69] Without the requirement for a sovereign buffer and on the basis of historic accounting treatment there would have been no shortfall.[70] The compliance with the third criterion – did the bank take excessive risk in acquiring sovereign debt? – was less clear, however. The Commission noted that MPS had been acquiring Italian governments bonds not only before the outbreak of the sovereign crisis in 2010, but also during the sovereign crisis.[71] The Commission considered that acquiring government bonds before the outbreak of the sovereign crisis did not amount to excessive risk-taking. The status of the strategy of acquiring government bonds after the outbreak of the sovereign crisis was less clear. The Commission noted, however, that the Italian State only sought *partial application* of the proportionate assessment.[72]

During the crisis, NordLB remained profitable (with the financial year 2009 as the only exception). Furthermore, NordLB was able to obtain finance from the market without any state support.[73] The Commission noted that the recapitalisation measures for NordLB were all related to EBA requirements (which were,

66. Caixa Geral de Depositos (CGD), 24 July 2013, para. 56; BPI, 24 July 2013, para. 59.
67. Caixa Geral de Depositos (CGD), 24 July 2013, para. 57; BPI, 24 July 2013, para. 61.
68. Banca Monte dei Paschi di Siena (MPS), 27 November 2013, para. 158.
69. Banca Monte dei Paschi di Siena (MPS), 27 November 2013, para. 159.
70. Banca Monte dei Paschi di Siena (MPS), 27 November 2013, para. 160.
71. Banca Monte dei Paschi di Siena (MPS), 27 November 2013, para. 161.
72. Banca Monte dei Paschi di Siena (MPS), 27 November 2013, para. 161.
73. NordLB, SA.34381, 25 July 2012, para. 11-12.

in turn, related to the confidence crisis on sovereign debt). The Commission therefore concluded that there was less need for significant restructuring, meaning that compensatory measures may in principle be limited.[74]

What are the implications of the proportionate assessment?

The proportionate assessment means that the Commission lightens its restructuring requirements. It usually concerns the need for burden-sharing measures and compensatory measures.

For instance, in the decision on Alpha Bank, the Commission noted that the own contribution and burden-sharing by Alpha Bank was much lower than what the Commission would usually consider sufficient. However, the Commission went on to observe the following:

> "In view of the elements discussed in section 7.6.1 and in particular the facts that Alpha Bank is the least aided bank among the large Greek banks and that the aid received fully qualifies for the exemption lay down in point 14 of the 2011 Prolongation Communication, under which the Commission can accept a lower own contribution and burden-sharing, the restructuring plan can be considered as providing for sufficient own contribution and burden-sharing measures".[75]

This recital illustrates that the Commission lightened its *burden-sharing requirements*. The proportionate assessment also had implications for the *compensatory measures*. This is illustrated by the following recital:

> "As discussed in section 7.6.1 of this Decision, the distortive effect of the aid measures is lower in the light of those factors as is the need for measures to limit distortions of competition. For those reasons, the Commission can exceptionally accept that, in spite of the high aid amount and the high market share, the restructuring plan does not envisage any downsizing of the balance sheet and loans in Greece".[76]

The proportionate assessment as a manifestation of a general principle

The basic idea behind the proportionate assessment is that if the bank's difficulties are mainly due to *external* factors, then there should be less need for far-reaching restructuring than when the difficulties are due to *internal* factors. While point 14 of the Prolongation Communication addresses a very specific type of situation, the more general principle can also be seen in the decisional practice of the Commission. This will be discussed in the following subsection.

74. NordLB, SA.34381, 25 July 2012, para. 160.
75. Alpha Bank, SA.34823, 9 July 2014, para. 296.
76. Alpha Bank, SA.34823, 9 July 2014, para. 299.

10.5.3 External or internal factors?

In several decisions, the Commission dwelled on the cause of the bank's difficulties. This can be illustrated by the case of the Bulgarian First Investment Bank (FIB), which was granted liquidity support in 2014. FIB experienced a sharp liquidity outflow. The outflow of deposits was *caused by the general liquidity crisis of June 2014 that endangered the entire Bulgarian banking sector*. This aspect was taken into account by the Commission who stressed that the liquidity support to FIB was *due to external factors* (and not to structural problems of the bank itself).[77] In addition, the Commission noted that FIB did not face any capital shortfall.[78] For these two reasons, the Commission considered that lighter restructuring was required (compared to what the Commission would seek when confronted with a bank receiving State aid to cover a capital shortfall).[79] This case illustrates that that if the bank's difficulties are mainly due to *external* factors, then there should be less need for far-reaching restructuring than when the difficulties are due to *internal* factors.

Furthermore, the case of FIB illustrates that *also outside the context of the proportionate assessment*, the Commission takes into account the macro-economic situation in the Member State. Another example is the case of Bank of Ireland. When assessing the measures to limit the distortion of competition, the Commission took into account the particular situation on the Irish financial markets.[80] This particular situation consisted of "a deep recession combined with a dramatic fall in property prices, high unemployment and foreign competitors that are retrenching".[81] The Commission held that, because of this particular situation on the Irish financial markets, a careful assessment of the market conditions and competitive environment was necessary.

It should be noted that an unfavourable macro-economic situation in the Member State cannot be used easily as an excuse for the bank's difficulties. In the decision on the Irish bank PTSB, the Commission first noted that all Irish banks were affected by the financial crisis. The Commission went on to consider that PTSB had *specific weaknesses* which exacerbated its situation.[82] Those specific weaknesses consisted of a "significant funding gap way above industry norms"

77. First Investment Bank (FIB), 25 November 2014, para. 81.
78. First Investment Bank (FIB), 25 November 2014, para. 80.
79. First Investment Bank (FIB), 25 November 2014, para. 83.
80. Bank of Ireland, N546/2009, 15 July 2010, para. 232-245.
81. Bank of Ireland, N546/2009, 15 July 2010, para. 227.
82. IL&P (PTSB), SA.33311, 20 July 2011, para. 15.

and an "exposure to the Irish and UK residential property market, combined with loss-making tracker mortgages and lower credit standards".[83] Similarly, in its decision on CCB/CCI, the Commission observed that "the economic recession was an *external* factor worsening an existing *internal* problem".[84]

One of the most prominent internal factors is the fact that the beneficiary bank has taken excessive risks.[85] This characteristic is important in the context of moral hazard. Moral hazard is problematic because (the expectation of) State aid induces banks to take excessive risks. If banks that have engaged in overly risky behaviour are rescued by the State, then compensatory measures are needed to address moral hazard. The problem of moral hazard is created by the fact that banks do not bear the downside consequences of their behaviour. As a result of the compensatory measures which are (to some extent) aimed at inflicting "pain" on the bank, the bank is forced to bear the consequences of its behaviour. This way, moral hazard is addressed. Conversely, if the beneficiary bank did not take excessive risks in the past, then there is less need to "punish" the bank.

To give an example: in its decision on ABN AMRO, the Commission stressed that the business models of Fortis Bank Nederland (FBN) and ABN AMRO N[86] did not rely on excessive risk-taking and unsustainable lending practices.[87] Hence the need for burden-sharing and compensatory measures was reduced:

> "In this case, FBN and ABN AMRO N do not primarily need State aid because they took flawed management decisions. The need for State aid does not stem for instance from the accumulation of excessive risks in their investments or in their lending policy, or because they had undertaken an unsustainable pricing policy. (…) Consequently, the Commission considers that the aid to FBN and ABN AMRO N is significantly less distortive

83. &P (PTSB), SA.33311, 20 July 2011, para. 15. These specific weaknesses are elaborated in para. 16-20 and 21-24.
84. Cooperative Central Bank and the Cooperative Credit Institutions (CCB/CCI), 24 February 2014, para. 23.
85. Using the fact that the bank has engaged in excessive risk-taking as a relevant characteristic, raises the question what exactly constitutes 'excessive risk-taking'. Banks cannot be blamed for taking risks, because risk-taking is part of doing business. Only *excessive* risk-taking is detrimental. But how to determine the difference between risk-taking and excessive risk-taking? The dividing line may be difficult to establish. This raises also the question whether the Commission is the appropriate authority to address excessive risk-taking and moral hazard. This concern was raised by Lyons & Zhu (2012).
86. ABN AMRO N is the part of ABN AMRO that was originally held by FBN and subsequently held by the Dutch State.
87. ABN AMRO, C11/2009, 5 April 2011, para. 155, 305, 316 and 320.

> than the aid approved in favour of financial institutions which had accumulated excessive risks. Therefore, the Commission considers that further divestments are not necessary".[88]

It should be noted that there are decisions in which the fact that the bank has engaged in excessive risk-taking is not mentioned in relation to the need for far-reaching restructuring in general, but *in relation to a specific restructuring measure*. For instance, the fact that the bank has engaged in excessive risk-taking can be a reason to replace the senior management of the bank, it can be a reason to improve the risk management of the bank, it can be a reason to improve the corporate governance framework of the bank, or it can be a reason to improve the remuneration policy of the bank (so that it does not encourage excessive risk-taking).[89]

In addition, there are many decisions in which these restructuring measures are mentioned *without reference to the cause of the bank's problems*. For instance, in the decision on Banco Comercial Português (BCP), the Commission observed that BCP had undertaken "a significant overhaul of strategy to strengthen its corporate governance management, most notably on risk management practices and controls".[90] Although this decision mentions the fact that the beneficiary bank has committed to improve its corporate governance and risk management, the decision does not mention whether the bank had internal problems that necessitated these restructuring measures. The decision on BCP is just an illustration of the many decisions in which the issue of whether the bank's problems are due to internal factors is not explicitly taken into account. This can be explained by the more general observation that the Commission did not explicitly assess in every bank State aid case whether far-reaching restructuring was needed.

10.6 Conclusion

In several bank State aid cases, the Commission explicitly considered that "far-reaching restructuring" was needed. The conclusion that far-reaching restructuring is needed, influences the Commission's assessment of whether the restructuring plan meets the three restructuring objectives. In that regard, the relevant characteristics discussed in this chapter can be considered as aggravating and mitigating factors. For instance, the fact that the bank did not engage

88. ABN AMRO, C11/2009, 5 April 2011, para. 320.
89. All these restructuring measures (aimed at restoring the long-term viability of the bank) will be discussed in chapter 11.
90. Banco Comercial Português (BCP), SA.34724, 30 August 2013, para. 87.

in excessive risk-taking is a mitigating factor, because it reduces the risk of moral hazard. Consequently, there is less need for burden-sharing measures and compensatory measures – as was illustrated by the case of ABN AMRO.[91] Similarly, the fact that the bank did not pay an adequate remuneration to the State, is an aggravating factor which is taken into account by the Commission in its assessment of whether the burden-sharing and compensatory measures are sufficient.

Although this principle might sound simple, the decisional practice is actually quite vague on the need for far-reaching restructuring. This is due to the following reasons.

In the first place, "far-reaching restructuring" is *not a clearly defined concept*. What exactly is far-reaching restructuring? In the decisional practice, some examples of far-reaching restructuring can be found: dramatic downsizing of the bank, a change of ownership of the bank, and/or the disappearance of the bank as a standalone entity.[92] To some extent, the conclusion that far-reaching restructuring is needed seems to imply that the bank should be 'punished'. However, even if one accepts the premise that a beneficiary bank should be punished, it is extremely hard to establish how much punishment the bank deserves. Indeed, for the reasons set out in section 6.4, I am of the opinion that the exact punitive effect (or degree of severity) of the restructuring plan cannot be established.

In the second place, in many bank State aid cases, *the need for far-reaching restructuring is not explicitly addressed* by the Commission. In that regard, it should be noted that the assessment of the need for far-reaching restructuring sometimes takes the form of a preliminary assessment that precedes the assessment of the compatibility of the restructuring plan; sometimes it is part of the compatibility-assessment. Indeed, the decisions in the cases of CGD, BPI, Eurobank, Alpha Bank, NBG, Pireaus Bank, Ethias and FIB[93] include a section that specifically addresses the need for far-reaching restructuring, while in all the other cases, the need for far-reaching restructuring is addressed less prominently in the decisions.

91. This case was discussed in section 10.5.3.
92. In the decision on WestLB (C40/2009, 20 December 2011, para. 166), the Commission held that in-depth restructuring "can go as far as liquidation". Indeed, WestLB was wound-down. In the decision of Parex banka (C26/2009, 15 September 2010, para. 127), the Commission held that the far-reaching restructuring in that case should include "a significant limitation of size of the distressed bank".
93. And to some extent, the decision on KBC (para. 139-140), ING (para. 118-119), Dexia (26 February 2010, para. 162-164).

In the third place, some of the relevant characteristics of the present chapter are *not always mentioned in relation to the need for far-reaching restructuring*. For instance – as discussed in section 10.5.3 – the fact that the bank's problems are caused by internal factors is sometimes only mentioned in relation to the need for a specific restructuring measure, rather than in relation to the need for far-reaching restructuring in general.

However, it should be noted that establishing the need for far-reaching restructuring is not an aim in itself. Indeed, the ultimate aim of restructuring is threefold: i) restoration of long-term viability; ii) burden-sharing; and iii) minimising competition distortions. The Commission's conclusion that far-reaching restructuring is needed, is only an *intermediate* step, in the sense that this conclusion influences the Commission's assessment of whether the restructuring plan meets the three restructuring objectives.

The aim of this PhD-study is to identify the characteristics that are relevant to the Commission's conclusion that the restructuring plan meets the three restructuring objectives. The current chapter discussed the characteristics that were relevant to the need for restructuring *in general*, while the following three chapters will focus on the characteristics that are *specifically related* to one of the three restructuring objectives: chapter 11 discusses the characteristics that are relevant to the assessment of the viability; chapter 12 discusses the characteristics that are relevant to the assessment of the burden-sharing; and chapter 13 discusses the characteristics that are relevant to the assessment of the competition distortions.

Chapter 11. Restoring long-term viability

11.1 Introduction

Restoring the long-term viability[1] of the beneficiary bank is the first pillar of the restructuring plan. In every Restructuring Decision, the Commission assesses whether the restructuring plan ensures that the beneficiary bank will return to long-term viability. The current chapter focuses on this viability-assessment.

11.1.1 Long-term viability

Granting State aid to failing banks keeps them afloat, but it does not change the underlying problems of these banks. Long-term viability cannot be achieved by State aid alone. In order to restore the long-term viability of the bank, the restructuring plan should identify the causes of the bank's difficulties and the bank's own weaknesses.[2] The restructuring plan should also propose restructuring measures that remedy the bank's weaknesses. The weaknesses and the corresponding viability-measures can relate to funding, corporate governance, risk management, staff remuneration, operational efficiency or the business model of the beneficiary bank. These viability-measures will be the focus of the current chapter.[3]

1. Point 13 of the Restructuring Communication gives the following definition of long-term viability: "Long-term viability is achieved when a bank is able to cover all its costs including depreciation and financial charges and provide an appropriate return on equity, taking into account the risk profile of the bank. The restructured bank should be able to compete in the marketplace for capital on its own merits in compliance with relevant regulatory requirements."
2. Point 10 of the Restructuring Communication.
3. The current chapter does not focus on the question to what extent the causes of the bank's failure are endogenous and to what extent external, since this issue is already covered in section 10.5.3.

11.1.2 The relevant context

Where a bank cannot be restored to viability, it should be *wound up in an orderly fashion*.[4] This is – by definition – the case in the W-context.[5] In this context, the first pillar of the restructuring plan is not focussed on the restoration of long-term viability, but on the orderly resolution. 'Orderly resolution' (in the W-context) is thus the counterpart of 'return to viability' (in the C-context). This illustrates the importance of the relevant context. How is the first pillar applied in the other contexts? In the T-context, the Commission assesses whether the purchaser is viable and capable of absorbing the transfer of the ailing bank.[6] In the S/T/W-context, the first pillar concerns the following three points: i) break-up of the beneficiary bank in an orderly fashion; ii) transferred business should be viable; iii) bad bank should be liquidated in an orderly fashion.

There are several scenarios in which an ailing bank can be rescued and restructured. It should be noted that the Restructuring Communication requires that the notification of the restructuring plan should include a comparison with alternative options.[7] The chosen alternative should be the least costly one. This follows from the principle that the aid should be limited to the minimum necessary, a principle which shall be discussed in more detail in the next chapter. At this point, it is worth stressing that an orderly wind-down scenario is only chosen when the viability of the bank cannot be restored.

11.1.3 Remedying the bank's weaknesses

The restructuring plan should contain measures that remedy the bank's weaknesses. These weaknesses can be manifold: they can concern the business model of the bank, its funding model, its corporate governance framework, its risk management system, etc. The fact that the restructuring plan addresses these weaknesses is relevant to the assessment of the return to long-term viability.[8] In this PhD-study, each restructuring measure remedying a specific weakness is considered a relevant characteristic. For instance, the fact that the restructuring plan provides for a reduction of the bank's reliance on wholesale funding is identified as a relevant characteristic.

4. Point 9 of the Restructuring Communication.
5. As set out in section 6.8, This PhD-study distinguishes between the C-context (in which the beneficiary bank continues to exist as a standalone entity), the W-context (in which the beneficiary is wound-down), the T-context (in which the beneficiary bank is taken-over by another bank), the S/C/W-context (in which the beneficiary bank is split-up in a good and bad part) and the S/T/W-context (in which the beneficiary bank is split-up in a good part – which is transferred to another bank – and a bad part – which is wound-down).
6. This will be discussed in section 11.10.
7. Point 9 of the Restructuring Communication.
8. In its decisional practice, the Commission explicitly indicated that it "notes positively that the restructuring plan identifies and aims at addressing many of the sources of the bank's difficulties" (OVAG, 9 December 2011, para. 56).

In that regard, two remarks are in order. Firstly, it should be noted that the bank's weaknesses are often *interrelated*. For instance, an excessive growth strategy may result in a large portfolio of non-performing loans (NPL's), which negatively affects the profitability of the bank. An excessive growth strategy is usually financed by a strong reliance on wholesale funding[9], and it is made possible by a weak risk management system (such as low credit standards). In addition, a weak corporate governance framework or inadequate remuneration system may induce the bank's senior management to take excessive risks and to pursue an aggressive growth strategy.[10]

Secondly, the distinction between the bank's weaknesses (and the corresponding restructuring measures) is not always clear-cut; they are not always classified in the same way. For instance, sometimes risk management is treated as part of the corporate governance framework; and sometimes, it is treated separately. Furthermore, risk management and the funding model are sometimes grouped together under the heading 'reduction of risk profile'. Similarly, the focus on the bank's core activities and the abandonment of risky activities can be classified under 'reduction of risk profile', but also under 'business model'. In addition, the business model can be understood as concerning the bank's activities. Conversely, it can also be understood as comprising both the activities and the funding.

To conclude, the restructuring measures each constitute a partial solution to the bank's problems. Consequently, although the weaknesses and the corresponding restructuring measures (and thus the relevant characteristics) are discussed separately in the following sections, they should not be viewed in isolation.

11.1.4 Structure of this chapter

The following sections discuss the characteristics that are relevant to the viability-assessment. These relevant characteristics concern the replacement of the bank's *senior management* (see section 11.2), the *corporate governance* framework (see section 11.3), the *remuneration* policy (see section 11.4), the *risk management* (see section 11.5), the *funding* strategy (see section 11.6), the *operational efficiency* (see section 11.7) and the *business model* (see section 11.8). Section 11.9 focuses on a specific viability-measure: asset relief. Sections 11.10 and 11.11 address the situation in which a bank is taken over by another bank. Furthermore, the Restructuring Communication provides that the restructuring plan should *demonstrate* how the bank will restore its long-term viability without State aid as soon as possible; this will be discussed in section 11.12.

9. If the bank's loan book expands more rapidly than its deposit base, then the funding gap will have to be met by wholesale funding.
10. The link between remuneration policies and risk management is also apparent in CRD IV. Recital 62 stresses that remuneration policies which encourage excessive risk- taking behaviour can undermine sound and effective risk management.

Almost every section of this chapter is dedicated to a specific relevant characteristic. With respect to each relevant characteristic, the following questions will be addressed: *Firstly*, why is this a relevant characteristic? *Secondly*, has the Commission consistently taken into account this relevant characteristic? *Thirdly*, how is this relevant characteristic elaborated in the decisions? Every section concludes with some concluding remarks: in these subsections, a summary of the main findings is given as well as a discussion of the implications (of the main findings) for the Commission and the beneficiary bank/Member State.

Thus, the sections of this chapter are structured in the same way and the structure of each section is based on the above-mentioned questions.[11] It should be noted that section 11.2 is more extensive than the other sections, because this section explains how I approach the above-mentioned questions. In that regard, section 11.2 is very instructive.

11.2 Replacement of senior management

* *The fact that the senior management of the beneficiary bank has been replaced.*

11.2.1 Why is this a relevant characteristic?

In several bank State aid cases, the senior management of the bank was replaced when the bank was rescued by the State. For instance, when the Dutch State nationalised SNS REAAL in February 2013, it appointed a new CEO and a new CFO.[12]

Another example is Banco Portugues de Negocios (BPN), which was nationalised in November 2008 by the Portuguese government. As part of the nationalization, the members of the board of BPN were replaced by executives appointed by Caixa Geral de Depósitos (CGD). CGD was a State-owned bank

11. With the exception of section 11.11, because this section applies to a very specific situation.
12. SNS REAAL, SA.36598, 19 December 2013, para. 13 and 84. For background information, see: Hoekstra & Frijns, Het rapport van de evaluatiecommissie nationalisatie SNS REAAL.

and it was given the task to manage BPN.[13] There was a specific reason for the replacement of BPN's senior management: the senior management of BPN had engaged in fraudulent behaviour.[14] In its decision on BPN, the Commission welcomed the fact that BPN's board had been changed.[15]

The fact that the senior management of the beneficiary bank has been replaced is a relevant characteristic. It is relevant for two reasons. In the first place, many restructuring plans envisage a return to a more traditional business model. This is usually accompanied by a change in management style. The replacement of the senior management can contribute to a *change in management style*.[16]

In the second place, the fact that the senior management of the bank is no longer involved in the bank's activities *provides a valuable signal against moral hazard*.[17] This is especially the case when the bank's management took the decisions leading to the bank's difficulties. If the management was responsible for the bank's failure, then they should bear the consequences.[18]

The current relevant characteristic is mentioned in the Crisis Communications. The Recapitalisation Communication holds that State aid for banks which are not fundamentally sound, can only be accepted "on the condition of either a bank's winding-up or a thorough and far-reaching restructuring, *including a change in management* and corporate governance where appropriate".[19] "Necessary management changes" were also mentioned in the Restructuring Communication.[20] The 2013 Banking Communication is even more clear about the importance of management changes. Point 37 of this Communication provides that "there should be incentives for banks" managements to undertake far-reaching restructuring in good times and, thereby, minimise the need to recourse to State support. Accordingly, if recourse to State aid could have reasonably been averted through appropriate and timely management action, any entity relying

13. CGD was state-owned and it was given the task to manage BPN. See Banco Portugues de Negocios (BPN), SA.26909, 24 October 2011, para. 18 and 112.
14. Banco Portugues de Negocios (BPN), SA.26909, 27 March 2012, para. 23 and 200. See also the Report of Financial Stability of the Bank of Portugal.
15. Banco Portugues de Negocios (BPN), SA.26909, 24 October 2011, para. 112.
16. See for instance: Parex banka, C26/2009, 15 September 2010, para. 136.
17. This was recognized by the Commission in its decision on SachsenLB (para. 126).
18. However, sometimes, the managers that could be considered responsible for the bank's failure are no longer part of the senior management of the bank. For instance, the former CEO of SNS REAAL, Sjoerd van Keulen, was responsible for the acquisition of Bouwfonds Property Finance in 2006. In 2009, he was succeeded by Latenstein.
19. Point 44 of the Recapitalisation Communication.
20. Point 11 of the Restructuring Communication.

on State aid for its restructuring or orderly winding down should normally replace the Chief Executive Officer of the bank, as well as other board members if appropriate".[21]

Thus, the Crisis Communications underline that the fact that the bank's senior management has been replaced[22] is a relevant characteristic.

11.2.2 Has the Commission consistently taken into account this relevant characteristic?

The above-mentioned considerations from the Crisis Communications might create the impression that in many bank State aid cases, the senior management has been replaced. Surprisingly, only in 23 Commission decisions (of in total 90 cases), it is mentioned that the senior management of the bank has been replaced. The table in Annex VII provides an overview of the decisions that mention that the senior management has been replaced.

Two things need to be clarified. First, categorizing decisions on the basis of whether they mention the relevant characteristic is sometimes a matter of interpretation (see subsection 11.2.2.1). Second, there might be explanations for the omission to mention a relevant characteristic (see subsection 11.2.2.2).

11.2.2.1 A matter of interpretation

The table in Annex VII indicates that there are only 23 decisions that mention that the senior management has been replaced. This number should be regarded with prudence, since categorizing cases on the basis of whether they mention the relevant characteristic is sometimes a question of interpretation. For instance, in the decisions on the Danish banks Amagerbanken, Roskilde Bank and Fionia Bank, the Commission did not explicitly mention the replacement of senior management in the assessment-part of the decision. However, in the decision on the Danish winding-up scheme, the Commission noted positively that removing

21. Point 37 of the 2013 Banking Communication. This consideration is similar to point 49 of the 2014 R&R-guidelines, which requires that if the beneficiary's difficulties could have been avoided through appropriate and timely management action, 'appropriate management changes' should have been made. The notion 'appropriate management changes' is less specific than point 37 of the 2013 Banking Communication.
22. A change of senior management is usually achieved by dismissing the board members. But it can also be achieved in a different way. This is illustrated by the banks that were wound-up under the Danish winding-up scheme. Under this winding-up scheme, the Financial Stability Company (FSC) would establish a subsidiary bank (New Bank) that would acquire the assets of the distressed bank (Old Bank). The FSC would appoint the board of directors of New Bank. See: N407/2010, 30 September 2010, para. 14. In my opinion, it does not really matter how the change of senior management is achieved. *That* the senior management is replaced is more important than *how* the senior management is replaced.

control from OldBank's management was a measure to minimise moral hazard.[23] Since the cases of Amagerbanken, Roskilde Bank and Fionia Bank are in line with the principles of the winding-up scheme, it can be argued that the relevant characteristic is indirectly mentioned in these cases.[24]

In only a few decisions, the current relevant characteristic was mentioned in the assessment-part. This is the case in 14 decisions.[25] There are 19 decisions in which the change of senior management is only mentioned in the description-part of the decision. It is thus not explicitly taken into account by the Commission *in its assessment*. However, this does not mean that the change of management is without significance. In these 19 decisions, the change of management is usually mentioned in the context of the description of the restructuring plan. For instance, one of the main features of the restructuring (plan) of Hypo Real Estate (HRE) was that "all the executive board members of HRE who held office before the crisis have been replaced".[26]

Thus, this relevant characteristic is sometimes mentioned only in the description-part of the decision. In my opinion, it would be better if this characteristic is explicitly mentioned in the assessment-part of the decision. Since this observation does not only apply to the current relevant characteristic, but to all relevant characteristics discussed in this chapter, this observation will be discussed in the final section of this chapter.

11.2.2.2 Possible explanations

The table in Annex VII shows that the replacement of the senior management is not mentioned in every decision. Indeed, there are 67 decisions (of in total 90 cases) that do not mention whether the senior management of the beneficiary bank has been replaced. It is striking that in so many decisions, the Commission did not explicitly take into account the relevance of management changes. How can this be explained?

In essence, there are four possible explanations for the omission to mention a relevant characteristic in certain decisions. *In the first place*, some relevant characteristics are not applicable in every context. However, regarding the current

23. N407/2010, para. 43.
24. They are therefore included in the category of decisions that do mention whether the senior management has been replaced.
25. There are 9 decisions that mention the change of management in the assessment of the bank's viability. There are 4 decisions that mention the change of management in the assessment of burden-sharing. There are 3 decisions that mention the change of management in the assessment of competition distortions.
26. Hypo Real Estate (HRE), C15/2009, 18 July 2011, para. 63.

relevant characteristic, this explanation can be discarded, since the change of management is applicable in every context.

In the second place, the State aid control policy of the Commission can evolve. This possible explanation can also be discarded. The relevance of this characteristic was not toned down in later Communications. On the contrary, the 2013 Banking Communication really emphasised the relevance of management changes.[27]

In the third place, the omission to mention the relevant characteristic could be due to an inconsistency. This is the case when the Commission does not mention the presence of a relevant characteristic in the decision, even though the relevant characteristic is present in the case. *In the fourth place*, the omission can be explained by the simple fact that the relevant characteristic was not present in the case at hand. This could – but does not necessarily have to – amount to an inconsistency. With respect to the third and fourth possible explanation, it is important to understand the difference between, on the one hand, the situation that the Commission *does not mention* if a relevant characteristic is present in a certain case, and on the other hand, the situation *that the relevant characteristic is not present in the case*. This is illustrated by the following matrix.

		Is the relevant characteristic present?	
		Present	Not present
Does the decision mention whether the relevant characteristic is present?	mentioned	The decision mentions that the relevant characteristic is present. *Present/Mentioned* *"situation P/M"*	The decision mentions that the relevant characteristic is absent. *Absent/Mentioned* *"situation A/M"*
	Not mentioned	The decision omits to mention that the relevant characteristic is present. *Present/Omitted* *"situation P/O"*	The decision omits to mention that the relevant characteristic is absent. *Absent/Omitted* *"situation A/O"*

"Situation P/M" and "situation A/M" fall under the scope of section 11.2.3 of the current chapter. Indeed, that section discusses the decisions that mention the relevant characteristic. The current section focusses on the decisions in which the relevant characteristic is not mentioned (i.e. ("situation P/O" and "situation A/O").

27. In addition, the fact that change of management figures as one of the general principles on resolution illustrates the relevance of this relevant characteristic. This makes it all the more surprising that this characteristic is not mentioned in every decision.

- *Situation P/O: senior management was replaced, but this was not taken into account by the Commission in its assessment and thus not mentioned in the decision*

This situation amounts to an inconsistency. In several cases, the fact that the senior management was replaced, was noted positively by the Commission. In these cases, the change of management was treated as relevant characteristic that positively contributes to the viability-assessment. If there would be cases in which the management was replaced, but in which this change of management was not noted positively by the Commission, then this would mean that the change of management was not treated as a relevant characteristic in those cases. Clearly, this would be a violation of the principle of equal treatment.

- *Situation A/O: the Commission did not mention the relevant characteristic, because the senior management of the bank was not replaced*

This situation is more nuanced. Two remarks are in order. *First*, it should be pointed out that the absence of a relevant characteristic in a case can be justified. For instance, as will be explained below, a replacement of the bank's senior management is not always required.

Second, the principle of equal treatment requires that the Commission assesses in each and every case whether a relevant characteristic is present (unless the characteristic is not applicable in that context or no longer relevant because of an evolving policy). The Commission should thus always assess whether the relevant characteristic (if applicable and still relevant) is present in the case at hand. Furthermore, this assessment should be expressed in the decision. In other words: the Commission should mention whether the relevant characteristic is present. Not mentioning the absence of a relevant characteristic can only be justified when two conditions are fulfilled: firstly, there is a justification for the absence of the relevant characteristic; and secondly, this justification of the absence of the relevant characteristic does not need to be explained in the decision and it should be obvious that the omission to mention the relevant characteristic means that the relevant characteristic is not present. Are these two conditions met with respect to the current relevant characteristic?

In that regard, it is worthwhile to recall point 37 of the 2013 Banking Communication:

> "If recourse to State aid could have reasonably been averted through appropriate and timely management action, any entity relying on State aid for its restructuring or orderly winding down should normally replace the Chief Executive Officer of the bank, as well as other board members if appropriate."

Thus, the necessity of a management change depends on several relevant aspects. First of all, the fact *that recourse to State aid could have reasonably been averted through appropriate and timely management action* is a relevant aspect. Another element that can be inferred from point 37 is “normally” (in the phrase “should normally replace the CEO”). The use of the term “normally” implies that there is room for exceptions. This, in turn, raises the question in which circumstances such an exception is justified. A last element that can be inferred from point 37 is “if appropriate” (in the phrase “as well as other board members if appropriate”). Also here, the question can be raised under which circumstances a replacement of other board members is “appropriate”.

The decisional practice (based on the 2013 Banking Communication) does not provide answers to these questions. This is surprising, because one would expect that the elements of point 37 of the 2013 Banking Communication would be applied in the decisions. For instance, one would expect that in cases in which the senior management was not replaced, the Commission would refer to the circumstances that justify why the CEO (and other board members) should not be replaced. It can be observed that this is not the case. Most of the decisions that are based on the 2013 Banking Communication are silent on point 37 of that Communication. Similarly, decisions taken before the introduction of the 2013 Banking Communication do not provide a justification why the senior management was not replaced (provided that that is the case).

To conclude, it can only be observed that there are some decisions that do not mention whether there has been a replacement of the bank’s senior management. It cannot be observed whether these decisions correspond to “situation P/O” or “situation A/O”. However, as discussed above, either situation would amount to an inconsistency.

11.2.3 How is this relevant characteristic elaborated in the decisions?

The current subsection zooms in on the 23 bank State aid cases in which Commission has mentioned the fact that the senior management of the bank had been replaced. How is “senior management” defined in those decisions? “Senior management” is a vague term that may be elaborated in various ways. As set out in section 6.7.3, I am of the opinion that divergent elaborations of “senior management” would be contrary to the principle of equal treatment.

It should be remarked that – although this PhD-study uses the term ‘senior management’ as an overall term – this term is not used in the Crisis Communications. The analysis of the decisional practice shows that there have been changes in the ‘Board of Directors’, ‘Supervisory Board’, ‘Management Board’, ‘senior management’ or ‘top management’. Sometimes, only specific board members are replaced (for instance in the case of SNS REAAL, where the CEO and CFO were replaced). Thus, the current relevant characteristic – i.e. the fact that the senior management has been replaced – is not consistently elaborated.

It should be pointed out that CRD IV and the BRRD contain some definitions. This will be discussed in more detail in section 11.2.4.

11.2.4 Impact BRRD

The BRRD has implications for the relevant characteristic discussed in the current section. The BRRD introduces general principles governing resolution. One of those principles is that the management body and senior management of the bank under resolution are replaced.[28] However, there is an exception to this principle: "in case the retention of the management body and senior management, in whole or in part, as appropriate to the circumstances, is considered to be necessary for the achievement of the resolution objectives".[29]

As explained in section 4.4.1, the granting of State aid to an ailing bank will usually trigger the resolution of that bank. Consequently – and in line with Art. 34(1)(c) BRRD – the management body and senior management of that bank should be replaced. This replacement of the bank's management will probably be viewed positively by the Commission in its decision on the State aid to that bank.

It should be recalled there are three exceptions to the general rule that State aid will trigger resolution. So it is possible to grant State aid to a bank without triggering the resolution of the beneficiary bank. This means that in those three situations, Art. 34(1)(c) BRRD does not apply to that bank. This does not mean, however, that its senior management does not have to be replaced. Indeed, notwithstanding the fact that the resolution principles of the BRRD do not apply, the 2013 Banking Communication still applies to this situation.

Furthermore, it is worth pointing out that a replacement of the bank's management is also possible before the resolution-stage. In the early intervention-stage, competent authorities have the power to replace the management body and senior management. Pursuant to Art. 27(1)(d) BRRD, competent authorities can require one or more members of the management body or senior management to be removed or replaced if those persons are found unfit to perform their duties pursuant to Article 13 of CRD IV. Article 28 BRRD provides for

28. Art. 34(1)(c) BRRD. That the resolution authorities should have the power to remove and replace the senior management and directors was also one of the FSB Key Attributes (3.2.i).
29. Article 63 BRRD ensures that resolution powers are granted resolution powers. Article 63 (1)(l) BRRD provides that Member States have to ensure that resolution authorities have the power to remove or replace the management body and senior management of an institution under resolution.

the possibility to remove the senior management in its entirety, when there is a significant deterioration in the financial situation of the bank or where there are serious infringements of law or serious administrative irregularities.

Another interesting aspect of the BRRD is that it gives a definition of the terms 'management body' and 'senior management'. More precisely, the BRRD refers to the definitions as provided by CRD IV. Pursuant to this definition, 'senior management' means those natural persons who exercise executive functions within an institution and who are responsible, and accountable to the management body, for the day-to-day management of the institution.[30]

11.2.5 Concluding remarks

The replacement of the bank's senior management is a relevant characteristic. In my view, it is good that the senior management of a beneficiary bank is replaced. It ensures that the bank's management has incentives to take measures to prevent the need for State aid. However, I recognise that there are situations in which the bank's management cannot be blamed for the bank's demise. I therefore welcome the fact that point 37 of the 2013 Banking Communication provides for exceptions to the general rule that the senior management should be replaced.

Although I applaud the 2013 Banking Communication, I am less enthusiastic about the decisional practice on this point. The present section has shown that there are many decisions that omit to mention whether the bank's senior management has been replaced. The omission to mention the relevant characteristic would suggest that the Commission did not take into account the relevant characteristic. This would amount to an inconsistency.

How to remedy this inconsistency? Requiring a replacement of the senior management in all bank State aid cases is not the appropriate solution. As set out above, I am of the opinion that there are situations in which a replacement of

30. 'Management body' means an institution's body or bodies, which are appointed in accordance with national law, which are empowered to set the institution's strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the institution.
See also CRD IV, recital 56: "A management body should be understood to have executive and supervisory functions. The competence and structure of management bodies differ across Member States. In Member States where management bodies have a one-tier structure, a single board usually performs management and supervisory tasks. In Member States with a two-tier system, the supervisory function is performed by a separate supervisory board which has no executive functions and the executive function is performed by a separate management board which is responsible and accountable for the day-to-day management of the undertaking. Accordingly, separate tasks are assigned to the different entities within the management body."

the senior management is not desirable. In my view, the correct solution would be for the Commission to clearly mention in every case whether the senior management has been replaced.

11.3 Corporate governance framework

* *The fact that the restructuring plan provides for an improvement of the bank's corporate governance framework.*

11.3.1 Why is this a relevant characteristic?

A weak corporate governance framework may be one of the causes of the bank's failure. For instance, the Commission noted that some of the Spanish banks "had several structural limitations, such as *weak corporate governance systems* which prevented those institutions from detecting problems at an early stage".[31] Consequently, restructuring plans should pay attention to corporate governance issues.[32]

The relevance of improving the corporate governance framework was already recognised in the 2004 R&R-guidelines. Point 37 of the R&R-guidelines required that "where the firm's difficulties stem from flaws in its *corporate governance system*, appropriate adaptations will have to be introduced". Furthermore, the Recapitalisation Communication provides that there should be "a thorough and far-reaching restructuring, including a change in management and *corporate governance* where appropriate".[33]

The decisional practice of the Commission shows that the Commission recognises the importance of corporate governance.[34] In many decisions, it welcomed measures aimed at improving the corporate governance. This can be illustrated by the following recital:

31. This consideration can be found in many decisions on the Spanish banks. For instance: Banco Gallego, SA.36500, 25 July 2013, para. 16.
32. Pursuant to point 11 of the Restructuring Communication, the restructuring plan should provide information on the corporate governance framework of the beneficiary bank.
33. Point 44 of the Recapitalisation Communication.
34. There is no universally agreed-upon definition of 'corporate governance', but corporate governance usually includes the issues of risk management and executive remuneration. Since these issues also have an independent meaning, these issues will be addressed in sections 11.4 and 11.5. Notwithstanding this separate discussion, in several decisions, the issues of risk management and remuneration are mentioned in relation to corporate governance. Similarly, in the Slovenian banking cases, the pricing policy is treated in relation to the corporate governance framework and risk management framework. In this PhD-study, the pricing policy will be discussed in section 13.10.

> "The commitments on corporate governance ensure that strategy and decisions are business-oriented and are neither biased by objectives other than value maximisation nor subject to improper external influence. Planned changes to the corporate governance will make the Bank less vulnerable to external influence and at the same time will introduce more market discipline through enhanced control and transparency in management decisions".[35]

This recital thus underlines that the fact that the beneficiary bank committed to strengthen its corporate governance framework is a relevant characteristic.

11.3.2 Has the Commission consistently taken into account this relevant characteristic?

The table in Annex VII gives an overview of the decisions that mention that the bank will improve its corporate governance framework. Of the 90 bank State aid cases that were analysed in this PhD-study, only 43 decisions mention that the corporate governance of the bank will be strengthened.[36] In 47 decisions, corporate governance is not mentioned. How can this be explained?

A possible explanation: the relevant context

To some extent, the fact that the relevant characteristic is not mentioned in 47 cases can be explained by the relevant context. Corporate governance is not mentioned in cases in the W-context. Indeed, if a bank is to be wound-down, then there is no need for measures that improve the corporate governance framework of that bank.

Decisions related to cases in the T-context and S/T/W-context[37] do usually not mention corporate governance issues. While there may be corporate governance problems, these problems are not addressed by means of corporate governance measures. However, the transfer of the bank's activities may constitute a solution to the corporate governance problems. This is illustrated by the decision on AB Ukio bankas, in which the Commission remarked that the sale

35. First Investment Bank (FIB), SA.39854, 25 November 2014, para. 102.
36. It should be noted that most of those 43 decisions mention the corporate governance issues in the assessment-part of the decisions. However, there are a few decisions that only mention the corporate governance issues in the description-part of the decision or the annex to the decision.
37. It should be stressed that although the fact that the corporate governance of the beneficiary bank will be improved is not applicable in the S/T/W-context, it can be mentioned in the S/C/W-context. In the S/C/W-context, the beneficiary bank is split-up into a good bank that continues to exist and a part that is put in liquidation. Since part of the bank continues to exist, corporate governance measures may still be relevant in this context.

of the legacy business to a buyer with a *proper corporate governance structure* would contribute to remedy the causes of the bank's difficulties and set it back on the path to a long-term viability.[38]

A possible explanation: absence of the relevant characteristic

Corporate governance is thus mainly relevant in the C-context (and S/C/W-context). However, not every decision in the C-context mentions corporate governance measures. A possible explanation for the omission is that in those cases, the restructuring plan of the bank in question did not include corporate governance measures. This would correspond to "situation A/O" of the matrix (introduced in section 11.2.2.2). Two questions are of importance: can *the absence* of corporate governance measures in the restructuring plan be justified? And can *the omission to mention the absence* of corporate governance measures be justified?

This first question can be answered affirmatively. Indeed, if a bank did not experience corporate governance problems, then there should be no need to improve the corporate governance framework. In that regard, it is worthwhile to recall that the Recapitalisation Communication provides that there should be "a thorough and far-reaching restructuring, including a change in management and corporate governance *where appropriate*".[39] The terms "where appropriate" indicate that restructuring plans should only focus on corporate governance where there are problems with the corporate governance of the bank.

The absence of corporate governance measures in the restructuring plan may thus be justified. Can it also be justified *that the Commission did not mention* the absence of corporate governance measures in the restructuring plan? On a side note, it should be recalled that the Commission should always *assess* whether the relevant characteristic is present. In one of its decisions, the Commission considered that "under the Restructuring Communication *it has also to be assessed* whether the restructuring plan addresses any existing or potential weaknesses in the corporate governance structure".[40] This consideration – and especially the phrase "has to be assessed" – would imply that the relevant characteristic is an assessment criterion. It could, however, be argued that this assessment does only have to be expressed in the decisions when the restructuring plan contains corporate governance measures. Consequently, it does not have to be mentioned when the restructuring plan does not contain corporate governance measures.

38. AB Ukio Bankas, SA.36248, 14 August 2013, para. 75.
39. Point 44 of the Recapitalisation Communication.
40. BayernLB, SA.28487, 5 February 2013, para. 190.

There is a difference between the current relevant characteristic and the one discussed in the previous section. Indeed, one would expect a replacement of the senior management to be present in every case. And if there is no change of senior management, one would expect a justification for the absence of this relevant characteristic. By contrast, one does not expect corporate governance measures to be present in every case (but only in cases in which there are corporate governance problems). This could justify that the absence of corporate governance measures in the restructuring plan is not mentioned in the decision.

A possible explanation: an inconsistency
The aforementioned explanation does not leave out the possibility that the omission to mention the relevant characteristic is due to an inconsistency. This can be clarified by an example: assume that a beneficiary bank has taken measures to improve its corporate governance framework. In other words: the relevant characteristic is present. Assume further that the Commission did not take into account these corporate governance measures undertaken by the bank. In other words: the Commission omitted to mention the presence of the relevant characteristic. This corresponds to "situation P/O" of the matrix. The omission to mention the corporate governance measures in this case is clearly inconsistent with the Commission decisions in which it did welcome corporate governance measures ("situation P/M").

To conclude, "situation A/O" seems to be a plausible explanation for the fact that there are 47 decisions that do not mention corporate governance measures. Nonetheless, "situation P/O" cannot be excluded.

11.3.3 How is this relevant characteristic elaborated in the decisions?

The analysis of the decisional practice reveals two conspicuous features. In the first place, corporate governance issues are not always described with the same level of detail (see subsection 11.3.3.1). In the second place, State involvement has a particular impact on the corporate governance question (see subsection 11.3.3.2).

11.3.3.1 The level of detail with which the corporate governance issues are described

As set out in subsection 11.3.2, there are 43 decisions that mention that the bank will improve its corporate governance framework. However, these 43 decisions do not mention the corporate governance measures *with the same level of detail*. There are two extremes. On the one hand, there are decisions that merely mention that the bank has undertaken a significant overhaul of its corporate governance framework.[41] By contrast, some decisions explain in-depth the corporate governance issues. In that regard, it should be kept in mind that corporate governance issues can be elaborated in two ways: *the measures themselves* can be described in detail; and/or *the need for those measures* (and thus their relevance) can be underlined. This can be clarified by the following examples.

The decision on Landesbank Baden-Württemberg (LBBW) is an example of a decision in which *the corporate governance measures* are described in detail.[42] LBBW is a German Landesbank and all its shareholders were either public entities or in state ownership.[43] Several measure were taken to improve the corporate governance, including the following:
– The restructuring plan ensured that LBBW would be less subject to improper influence by the shareholders. The restructuring plan envisaged a change in legal form: LBBW would be converted from a company governed by public law into an SE or public limited company.[44]
– Important aspects of the voluntary German Corporate Governance Code were introduced.[45]
– The restructuring pan envisaged that the Administrative Board of LBBW would be reshaped into an independent Supervisory Board in accordance with the model in the Corporate Governance Code.[46]
– The 'fit and proper' test was introduced.[47]
– The arms-length principle should apply in relations with shareholders.[48]

The decision on Sparkasse KölnBonn is an example of a decision that dwells on *the need for an improvement* of the corporate governance framework. Sparkasse KölnBonn is a German savings bank, held by city of Köln (70%) and the city of Bonn (30%). In the Opening Decision, the Commission noted that there was a lack of separation of the interests of the owners as public entities and as owners of the economic entity of a bank.[49] Many investment decisions of Sparkasse KölnBonn were politically-driven.[50] For instance, the 100% ownership of Sparkasse KölnBonn in Magic Media Company TV

41. For instance: Banco Comercial Portugues (BCP), SA.34724, 30 August 2013, para. 87; Ethias, N256/2009, 20 May 2010, para. 119.
42. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 84. NB: the issue of corporate governance was not mentioned in the Opening Decision of 30 June 2009.
43. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 7.
44. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 27.
45. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 27.
46. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, annex 22.
47. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 29.
48. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, annex 25.
49. Sparkasse KölnBonn, C32/2009, 4 November 2009, para. 55.
50. Sparkasse KölnBonn, C32/2009, 29 September 2010, para. 37.

Produktionsgesellschaft – which contributed to the need for risk provisions in 208 – seemed to be driven by the desire of the city of Koln to develop and promote the city as a media city.[51] In the Opening Decision, it was pointed out that "it must be ensured that the problems of the past are not replicated and that any lasting solution should therefore address the issue of corporate governance".[52]

A very specific corporate governance measure can be found in the decision on the Italian bank Monte dei Paschi di Siena (MPS). The Articles of Association of the Italian bank MPS contained a limitation with respect to the voting rights that shareholders could exercise. It was stipulated that no shareholder other than the Foundation could own ordinary shares exceeding 4% of MPS's share capital and that the voting rights on shares held in excess of this 4%-cap could not be exercised. In July 2013, this 4%-cap was removed. The Commission welcomed this, since this would introduce "market discipline through effective shareholder control of the management actions".

11.3.3.2 State involvement

One particular aspect of the corporate governance framework is *State involvement*. In many cases, the State acquired a significant ownership of the bank and some banks were completely nationalised. Many cases are thus characterised by State involvement.[53]

In several Commission decisions, the State involvement is viewed as a positive characteristic. For instance, Anglo-Irish Bank faced corporate governance difficulties.[54] The Commission therefore noted positively that following the rescue recapitalisation, the Irish State had a representative in the board of Anglo-Irish Bank and that there were voting rights attached to the Irish State's preferred shares.[55] As is illustrated by the case of Anglo-Irish Bank, the Member State sometimes obtains voting rights as a result of the capital injection. However, this is not always the case. Sometimes, recapitalisations are set up in such a way that the Member State does not obtain voting rights. For instance, Austria subscribed

51. Sparkasse KölnBonn, C32/2009, 4 November 2009, para. 11.
52. Sparkasse KölnBonn, C32/2009, 4 November 2009, para. 55. See also: Sparkasse KölnBonn, C32/2009, 29 September 2010, para. 37-41 and 80 for a description of the corporate governance measures.
53. In some cases, the State acquired the right to appoint members of the (Supervisory) Board of the beneficiary bank. For instance, the Dutch State had the right to appoint two members of the Supervisory Board of SNS REAAL and ING. This is also a form of state involvement, although it is very different from state involvement in the form of state ownership.
54. These were described in the decision on Anglo-Irish Bank (N9/2009, 14 January 2009, para. 14). The corporate governance problems of Anglo-Irish bank were also signalled in the literature; see for instance: Murphy 2013, p. 263 and 270-271.
55. Anglo-Irish Bank, N9/2009, 14 January 2009, para. 71.

to the participation certificates ("Partizipationsscheine") of OVAG without obtaining voting rights.[56] This aspect was not mentioned in the compatibility-assessment – however, this can be explained by the fact that OVAG did not experience corporate governance difficulties.

State involvement is not always welcomed by the Commission. This was already illustrated by the above-mentioned case of Sparkasse KölnBonn: as set out in subsection 11.3.3.1, Sparkasse KölnBonn's investment decisions seemed politically-driven (instead of business-oriented). Similarly, the decision on the Slovenian bank Nova Ljubljanska banka (NLB) indicates that "weak corporate governance rules and the resulting influence of the State in the day-to-day business of the bank was also one of the reasons leading to the problems of the bank".[57]

In the case of Alpha Bank (a Greek bank), there was a bridge recapitalisation to be replaced by a permanent recapitalisation. One of the possibilities was that Alpha Bank would come under State control. In that regard, the Commission stressed the importance of an adequate corporate governance framework. Otherwise, there would be a risk that – due to public interference in the day-to-day management of the bank – lending decisions would no longer be taken on the basis of commercial criteria, which would endanger the bank's return to viability. In that respect, the Commission observed that some of the State-controlled banks in Greece had a poor track-record.[58]

To conclude, in some cases, State involvement is viewed as a positive characteristic, whereas in some other cases, State involvement is considered to be a negative characteristic. This reflects the fact that State involvement can be part of the solution, or part of the problem.[59]

11.3.4 Concluding remarks

The fact that the restructuring plan provides for an improvement of the bank's corporate governance framework is a relevant characteristic (see subsection 11.3.1). The present section has shown that there is a clear link between this relevant characteristic and the (existence and nature of the) corporate governance problems of the bank. *Whether* the relevant characteristic is mentioned in the decisions depends on the question whether the bank had corporate governance problems (see subsection 11.3.2). In the same vein, *the way in which*

56. OVAG, SA.31883, 9 December 2011, para. 23.
57. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 126.
58. Alpha Bank, SA.34823, 27 July 2012, para. 61.
59. State involvement does not have to be problem if there is a strong corporate governance framework which ensures that lending decisions are business-oriented and not politically-driven.

this relevant characteristic is mentioned and elaborated in the decisions depends on the nature of the corporate governance problems (see subsection 11.3.3).

Thus, the mere fact that corporate governance measures are not mentioned in all decisions does not necessarily mean that there is an inconsistency. Likewise, the mere fact that this relevant characteristic is not always elaborated in the same way does not necessarily amount to an inconsistency. As long as the link – between the relevant characteristic on the one hand and the existence and nature of the corporate governance problems of the bank on the other hand – is consistently made, there is no inconsistency.

In other words: I am of the opinion that the Commission should mention corporate governance in its decision when the case is characterised by corporate governance measures and that the Commission does not have to mention corporate governance when there are no corporate governance measures in the case.[60] Normally, I would suggest that the Commission should not only mention the presence but also the absence of a relevant characteristic. However, for the reasons set out in subsection 11.3.2, the omission to mention the absence of this particular relevant characteristic can be justified.

Subsection 11.3.2 also discussed that "situation P/O" could not be excluded as a possible explanation for the fact that there are 47 decisions that do not mention corporate governance issues. So there is a risk of inconsistency. Nonetheless, this risk is quite limited for future cases. Indeed, if the Commission does not take into account the corporate governance measures undertaken by a beneficiary bank, then this would be inconsistent. However, since it is in the bank's own interest that the Commission (positively) notes the presence of corporate governance measures, the bank or Member State should stress the fact that the bank has taken measures to improve its corporate governance framework.

60. This would correspond to situation P/M and A/O.

11.4 Remuneration policy

* *The fact that the restructuring plan contains restrictions of the remuneration of the beneficiary bank's employees and managers.*

11.4.1 Why is this a relevant characteristic?

Many restructuring plans include changes to the remuneration policy. These changes will usually entail that the remuneration of the bank's senior management will be restricted. This is relevant from three perspectives. In the first place, the remuneration policy can be considered as part of the corporate governance framework or risk management.[61] Remuneration restrictions are thus relevant from a viability-perspective.[62] In the second place, limiting the staff remuneration can be classified as a cost-cutting measure (see section 11.7).[63] In the third place, remuneration restrictions usually cease to apply when the State aid has been fully repaid. In this sense, remuneration restrictions serve as an incentive to exit from State aid. From this perspective, remuneration restrictions can be regarded as behavioural remedies.[64]

The relevance of this characteristic is also underlined in the Crisis Communications.[65] In particular, point 45 of the Recapitalisation Communication stipulates that the behavioural safeguards for distressed banks should, in principle, include a limitation of executive remuneration or the distribution of bonuses.

61. The relation between remuneration policies and risk management is recognised in CRD IV: "Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management of credit institutions and investment firms." (recital 62 CRD IV).
62. In the literature, it has been argued that remuneration restrictions might be counterproductive. Heimler & Jenny (2012, p. 364) argue that remuneration restrictions might induce good managers of beneficiary banks to leave the bank for better jobs elsewhere. This would obviously not contribute to the return to long-term viability of the bank.
63. For instance, the decision on Abanka (SA.38228, 13 August 2014, para. 142) explicitly mentioned the restrictions on remuneration as a cost-cutting measure: "Third, as regards covering the restructuring costs associated with the implementation of the restructuring plan through Abanka's internal measures, Abanka will carry out cost-cutting measures resulting in a decrease of its operating costs from EUR 59.8 million in 2013 to EUR [50-60] million in 2018. The restructuring plan and the commitments also provide for restrictions to be applied, until 31 December 2018, to the total remuneration of any board member and employee performing special work."
64. See, for instance: LCCU, SA.34208, 26 September 2012 para. 58. In the decision on Fortis (NN42/2008, 3 December 2008, para. 96), the Commission held that it was "not necessary to impose any behavioural remedies, such as a prohibition on dividends or a *reduction in management remuneration, which it generally imposes as an incentive to minimising the period of public ownership*".
65. The Restructuring Communication only required that the restructuring plan should include information on the remuneration incentive structure. See point 11 of the Restructuring Communication.

Point 45 of the Recapitalisation Communication only concerns distressed banks (as opposed to fundamentally sound banks). A more general provision can be found in the 2013 Banking Communication: point 38 provides that any bank in receipt of State aid in the form of recapitalisation or impaired asset measures should restrict the total remuneration to staff, including board members and senior management, to an appropriate level. The 2013 Banking Communication further specifies that the cap on total remuneration should be in line with Articles 93 and 94 of the EU Capital Requirements Directive (CRD IV). In addition, point 38 of the 2013 Banking Communication provides that the total remuneration of a board member or senior manager may not exceed 15 times the national average salary in the Member State where the beneficiary bank is incorporated or 10 times the average salary of employees in the beneficiary bank.

11.4.2 Has the Commission consistently taken into account this relevant characteristic?

In 43 decisions (of in total 90 cases), it is mentioned that the bank will adapt its remuneration policy. In 1 decision, the Commission explicitly indicated that a remuneration restriction was not necessary.[66] Thus, in (43+1=) 44 decisions, the Commission has assessed whether the relevant characteristic was present.[67] An overview of these decisions is provided in the table in Annex VII.

An intriguing finding is the following: several Restructuring Decisions do not mention remuneration restrictions, even though these cases were characterised by remuneration restrictions. In that regard, it should be recalled that bank support schemes always provide for some behavioural safeguards and that one of these behavioural constraints is the limitation of executive remuneration. Indeed, as touched upon in section 8.8, remuneration restrictions can be found in 23 bank support schemes. Banks are sometimes subject to remuneration restrictions, but this is not always taken into account in the Restructuring Decisions. To give an example: AIB/EBS participated in the Irish guarantee scheme and was therefore subject to several behavioural constraints, including remuneration restrictions. The Rescue Decision on AIB/EBS – though it does not speak of remuneration restrictions – mentions that the bank is subject to behavioural constraints as a result of its participation to the Irish guarantee scheme. By contrast, the Restructuring Decision does not mention the behavioural constraints under the scheme at all. Thus, the remuneration restrictions were taken into account in the assessment of the proportionality of the State aid

66. Fortis, NN42/2008, 3 December 2008, para. 96. NB: this decision corresponds to "situation A/M".
67. In the majority of the cases, the remuneration restrictions are mentioned in the description of the restructuring plan (either in the description-part of the decision or in the annex). Only a few decisions mention the remuneration restrictions in the assessment-part.

measures (i.e. the first stage of the compatibility-assessment), but they were not taken into account in the assessment of the restructuring plan (i.e. the second stage of the compatibility-assessment).

11.4.3 How is this relevant characteristic elaborated in the decisions?

The remuneration restrictions can be elaborated on the basis of their *aim* (see subsection 11.4.3.1) and their *modalities* (see subsection 11.4.3.2).

11.4.3.1 The aim of the remuneration restrictions

A prime observation is that the remuneration restrictions are sometimes aimed at corporate governance, sometimes at cost-cutting and sometimes at both. To give an example, in the decisions on the four large Greek banks[68], the restrictions on remuneration are mentioned in two contexts: in the context of corporate governance and in the context of a cost-cutting programme. This can be illustrated by recitals 140 and 346 of the decision on Piraeus Bank. In recital 140, the restrictions of the remuneration are presented as a corporate governance measure:

> "Greece gave a number of commitments related to the *corporate governance* of the Bank. It committed to limit the remuneration of the Bank's employees and managers".[69]

In recital 346, the restrictions of the remuneration are presented as a cost-cutting measure:

> The Bank has also engaged in a far-reaching *cost reduction programme*, as indicated in section 2.4.2. Its costs will further decrease until 2017. Its workforce is being reduced and salaries adjusted downwards. Greece has also committed to limit the remuneration of the Bank's managers, […]".[70]

11.4.3.2 The modalities of the remuneration restrictions

Remuneration restrictions can differ on their modalities. Some restructuring plans *refer to a remuneration standard*: such as the G20 principles and the FSA Remuneration Code (in the decision on RBS[71]) or the local guidelines of the 'Adviescommissie Toekomst Banken' (in the decision on SNS REAAL[72]). Other restructuring plans *clearly indicate a cap on remuneration*. For instance,

68. i.e. Alpha Bank, Eurobank, Piraeus Bank and National Bank of Greece (NBG).
69. Pireaus Bank, SA.34826, 23 July 2014, para. 140.
70. Pireaus Bank, SA.34826, 23 July 2014, para. 346.
71. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 106.
72. SNS REAAL, N371/2009, 28 January 2010, para. 48.

BayernLB had committed to a cap of EUR 500.000 on staff remuneration.[73] This is an *absolute* cap. By contrast, point 38 of the 2013 Banking Communication provides for a *relative* cap: the total remuneration of a board member or senior manager may not exceed 15 times the national average salary in the Member State where the beneficiary bank is incorporated or 10 times the average salary of employees in the beneficiary bank.

Another modality of the remuneration restrictions is the *duration* of these restrictions. In that regard, the 2013 Banking Communication specifies that the restrictions on remuneration should apply during the entire restructuring period, unless the beneficiary bank has repaid the State aid before the end of the restructuring period.

To conclude, the 2013 Banking Communication is quite clear on how the remuneration should be restricted. By contrast, in the pre-2013 Banking Communication, the remuneration restrictions were often designed in diverging ways.

11.4.4 Concluding remarks

Executive remuneration is a contentious issue. Especially 'excessive' bonuses are sometimes heavily criticized. There are many arguments both in favour and against remuneration restrictions, but this PhD-study is not the place to discuss the merits of remuneration restrictions. Rather, this PhD-study – and in particular the present section – is aimed at finding out whether the Commission has consistently taken into account the fact that the beneficiary bank is subject to remuneration restrictions.[74]

In that regard, the present section has shown that the 2013 Banking Communication is of key importance to the current relevant characteristic. In the first place, this Communication made clear that remuneration restrictions were always required. In the second place, this Communication is quite clear on how the remuneration should be restricted. Subsection 11.4.3 has shown that the modalities of the remuneration restrictions were often different per bank. The 2013

73. BayernLB, SA.28487, 5 February 2013, para. 211 and annex point 23.
74. Although the fact that the beneficiary bank is subject to remuneration restrictions is a relevant characteristic, it should be noted that remuneration restrictions are not only relevant in the context of State aid. Indeed, every bank in the EU is confronted with some remuneration restrictions. In particular, CRD IV contains several provisions on remuneration policy. Art. 94 CRD IV provides for a cap on the variable remuneration: the variable component shall not exceed 100% of the fixed component of the total remuneration. CRD IV allows for the possibility for Member States to set a lower maximum percentage. The Dutch legislator has used this possibility. Indeed, the *Wet beloningsbeleid financiele ondernemingen* (Wbfo) provides for a cap of 20% (instead of 100%).

Banking Communication put an end to this. To conclude, the adoption of the 2013 Banking Communication made an important contribution to a consistent application of the remuneration restrictions. From that viewpoint, I greatly welcome the adoption of the 2013 Banking Communication.

11.5 Risk management

* *The fact that the restructuring plan provides for an improvement of the bank's risk management.*

11.5.1 Why is this a relevant characteristic?

Banks have to deal with several kinds of risks: credit risk, concentration risk, securitisation risk, market risk, operational risk, liquidity risk and risk of excessive leverage.[75] Naturally, those risks have to be managed. Hence, risk management is very important in banking. The financial crisis showed that several banks had a weak and inadequate risk management. Consequently, those banks undertook to improve their risk management. This was welcomed by the Commission, because an improved risk management contributes to the return to viability. For instance, in one of its decisions, the Commission noted that the improvements of the bank's risk management were "very important elements to restore viability and profitability".[76]

To some extent, risk management is related to the corporate governance framework and the organisational structure. For instance, the introduction of a Chief Risk Officer (CRO)[77] or the creation of a risk committee within the Board of Directors[78] are both measures that can be categorised as corporate governance measures. Likewise, the commitment that the Risk Management department will be fully independent from commercial networks[79] concerns the organizational structure of the bank.

75. See also Art. 79-87 CRD IV.
76. Cooperative Central Bank (CCB), SA.35334, 24 February 2014, para. 123.
77. EBS, C25/2010, 11 October 2010, para. 88.
78. Ethias, N256/2009, 20 May 2010, annex 1.1.
79. Alpha Bank, SA.34823, 9 July 2014, para. 6.

It should be recalled that a reduction of the bank's risk profile can be achieved in different ways.[80] A bank can reduce liquidity risk by improving its funding model ("liquidity profile rebalancing"[81]). Furthermore, a bank can focus on its core activities and withdraw from risky activities. These risk-reducing measures will be discussed in sections 11.6 and 11.8. The present section will focus on risk management.

11.5.2 Has the Commission consistently taken into account this relevant characteristic?

The table in Annex VII gives an overview of the decisions that mention that the bank will improve its risk management. In 42 decisions, risk management issues are mentioned, whilst in 48 decisions (of in total 90 cases), it was not mentioned that the bank would improve risk management.[82] How can this be explained? The most probable explanation is that those banks did not have significant risk management problems, so that there would have not been any need to improve the risk management. Furthermore, it should be recalled that a reduction of the bank's risk profile can also be achieved in other ways.[83]

The reasoning used in section 11.3.2 to justify the omission to mention the absence of corporate governance measures in the restructuring plan also applies to the current relevant characteristic. If one expects a relevant characteristic to be present, the absence of this characteristic should be justified in the decision. Conversely, if one does not expect the presence of a relevant characteristic, its absence does not necessarily need to be justified in the decision. So this possible explanation is a plausible one. Nonetheless, it does not leave out the possibility that the omission to mention the relevant characteristic is due to an inconsistency ("situation P/O" of the matrix).

80. "De-risking" (i.e. a risk-reducing policy) can consist of a number of measures. A risk-reducing measure is a reclassification of a number of the bank's ABS from the available for sale category into the held-to-maturity category, thus limiting the volatility of the negative revaluation reserve. ING, C10/2009, 18 November 2009, para. 52.
81. Banca Monte dei Paschi di Siena (MPS), SA.36175, 27 November 2013, para. 68-71.
82. In two decisions (on Anglo/INBS and AIB/EBS), risk management is only mentioned as a problem. These two decisions do not indicate that the banks in question will improve their risk management. These decisions are therefore not included in the 43 decisions in which the current relevant characteristic is mentioned.
83. In the decision on LBBW (para. 25), it was even indicated that "the *need for risk management* and financial control *will diminish* as LBBW will abandon entire business areas and product lines, reduce its presence abroad and sell subsidiary and associated companies".

11.5.3 How is this relevant characteristic elaborated in the decisions?

It should be kept in mind that the commitment to improve the risk management is a response to a problem (i.e. a weak risk management). Since there are different kinds of risks, the improvement of the risk management depends on the specific kind of problems of the bank. It can be observed that in some decisions, the emphasis is on the problem; while in other decisions, the commitment to improve is emphasised.

The decision on Lithuanian Central Credit Union (the LCCU) is a prime example of a decision that really stresses the origin of the bank's problems. The problems concerned a very specific type of risk: concentration risk/single borrower exposure. The LCCU had lend funds (mostly in the form of overnight deposits) to AB Snoras bank. Unfortunately, AB Snoras bank went bankrupt in 2011. Also unfortunately, the exposure of the LCCU to AB Snoras bank was very large. The LCCU did comply with the requirement that the maximum exposure to a single borrower should not exceed 25% of its capital. However, overnight deposits were not included in this ratio. When AB Snoras bank went bankrupt, the deposit of the LCCU in AB Snoras bank became unrecoverable. Consequently, the LCCU experienced serious difficulties. Since the LCCU's problems were mainly caused by the concentration risk (single borrower exposure), the measures needed to restore long-term viability were mainly aimed at improving the risk management and internal control systems.[84] In addition, the LCCU committed to limit its exposure to a single borrower to 25% of its capital independently of the type of exposure (thus including overnight deposits) during the restructuring period.[85]

To conclude, the way how risk management is mentioned in the decisions depends on the nature of the risk management problems.

11.5.4 Concluding remarks

To some extent, the present section is a repetition of section 11.3.4. Indeed, the concluding remarks that were made in relation to the corporate governance measures also apply to the present section. My recommendation to the Commission is thus similar to the one of the section 11.3.4: the Commission should mention risk management in its decision when the case is characterised by measures to improve the bank's risk management, whereas the Commission does not have to mention risk management when there are no measures to improve the risk management.[86] My recommendation to the bank and Member

84. Lithuanian Central Credit Union (LCCU), SA.34208, 26 September 2012, para. 46-47.
85. Lithuanian Central Credit Union (LCCU), SA.34208, 26 September 2012, para. 48.
86. This would correspond to situation P/M and A/O.

State is as follows: the bank and Member State should either stress the fact that the bank committed to take measures to improve its risk management or stress the fact that the risk management of the bank does not need to be improved.

11.6 Funding

* *The fact that the restructuring plan provides for a reduction of the bank's reliance on wholesale funding.*

11.6.1 Why is this a relevant characteristic?

In several reports investigating the financial crisis, it is highlighted that many banks heavily relied on wholesale funding. For instance, the Liikanen report mentions the reliance of banks on short-term wholesale funding as one of the key factors in the build-up of systemic risk.[87] Similarly, the Treasury Committee of the House of Commons noted that banks which relied most heavily on wholesale funding, rather than deposits, have proven to be most likely to fail.[88]

Since wholesale funding is short-term funding, it is not a very stable funding source.[89] As long as the wholesale market is functioning well, an excessive reliance on wholesale funding does not have to be a problem. However, when the wholesale market dries up – which occurred after the collapse of Lehman Brothers – banks that are heavily dependent on wholesale funding may face liquidity problems. Those banks are no longer able to finance their operations.

One of the key lessons of the crisis is that banks that relied too heavily on wholesale funding should re-adapt their funding structure towards more stable funding sources. This is also recognised by the Commission in its decisional practice. The fact that the restructuring plan provides for a reduction of the bank's reliance on wholesale funding is therefore a relevant characteristic.

11.6.2 Has the Commission consistently taken into account this relevant characteristic?

The analysis of the decisional practice reveals the following. In 45 decisions, it was mentioned that the beneficiary bank would improve its funding strategy. Interestingly, there are also some banks that did not have funding problems. As is shown in the table in Annex VII, there are 9 decisions that indicated that the bank did not have funding problems. Thus, in 54 decisions (i.e. 45+9), the Commission explicitly took into account the relevant characteristic.

87. Liikanen Report 2012, p. 50. The Liikanen Report refers to several studies that link short-term wholesale funding and (systemic) risk.
88. House of Commons, Treasury Committee, 'Banking Crisis: dealing with the failure of the UK banks', Seventh Report of Session 2008-09, p. 43.
89. By contrast, retail deposits are a more stable funding source.

By contrast, there are 36 decisions (of in total 90 cases), in which the Commission did not explicitly take into account the current relevant characteristic.[90] This is surprising, given the fact that there are 9 decisions in which the Commission explicitly mentioned the absence of the current relevant characteristic. If the relevant characteristic would also be absent in the 36 cases listed above, then the omission to mention this absence would amount to an inconsistency between these 36 decisions and the 9 decisions (which do mention the absence of funding problems).

Under this assumption, the 36 cases correspond to “situation A/O” of the matrix (introduced in section 11.2.2.2), while the 9 cases correspond to “situation A/M” of the matrix. Situation A/O (i.e. the omission to mention the absence) can be justified, but only when it is obvious that the omission implies absence of the relevant characteristic. However, the fact that there are decisions in which the absence is explicitly mentioned (i.e. “situation A/M”) means that it can never be obvious that the omission of the characteristic means absence of the characteristic. Thus, the co-existence of “situation A/M” and “situation A/O” implies an inconsistency.

11.6.3 How is this relevant characteristic elaborated in the decisions?

The present subsection zooms in on the 45 decisions that mention funding issues. While the relevant characteristic concerns the improvement of the funding structure (see subsection 11.6.3.2), it might be useful to elucidate on the funding problems (see subsection 11.6.3.1). One of the most striking observations is that some decisions explicitly mention that the bank did not have funding problems (see subsection 11.6.3.3).

11.6.3.1 Funding problems

There is a difference in the way how the funding problems are mentioned. Sometimes, they are mentioned quite prominently; sometimes, they are mentioned only briefly. Some decisions really stress the funding problems of the bank. For instance, the decision on Hypo Real Estate (HRE) indicates – in the section that describes the problems of the bank – that “at the end of September 2008, HRE faced a liquidity shortage, which put the bank on the brink of insolvency”.[91]

90. NB: There are some decisions that do not explicitly mention that the bank had funding *problems*. However, since these decisions do indicate that the bank will *improve* its funding structure, the issue of funding is taken into account by the Commission. These decisions are therefore not included in the list of Commission decisions that to not mention the current relevant characteristic.
91. Hypo Real Estate (HRE), C15/2009, 18 July 2011, para. 24.

This liquidity shortage was related to HRE's reliance on wholesale funding. Especially its subsidiary DEPFA Bank was highly dependent on an intact interbank money market.[92]

Likewise, HSH Nordbank was heavily reliant on savings banks as a privileged source of funding.[93] "Because HSH does not have access to retail customers to any significant extent, the bank will continue to rely on the wholesale markets where it will have difficulties securing funding. Compliance with more stringent regulatory requirements on capitalisation, liquidity buffers, and funding mismatches would be a particular challenge for pure wholesale banks like HSH".[94]

11.6.3.2 Improving the funding structure

An excessive reliance on wholesale funding can be a problem. How to reduce the dependence on wholesale funding? There are essentially three strategies to solve funding problems: i) diversifying the sources of funding, ii) deleveraging the balance sheet, and iii) transfer of the ailing bank to a bank with a good financing position. NB: The third strategy is only applicable in the T-context and S/T/W-context.

Diversifying the sources of funding

With respect to the first strategy, it should be recalled that a bank has several sources of funding and that a bank can improve its funding structure by diversifying the sources of funding. This is usually achieved by increasing the deposit base. Retail deposits are considered a stable source of funding.[95]

The deposit base can be increased by measures aimed at attracting potential depositors and at retaining current depositors. The decision on First Investment Bank (FIB) – a Bulgarian bank that had faced a liquidity crisis and was aiming at strengthening its funding policy – illustrates these measures. FIB set out a *deposit-centred strategy* with the aim at regaining the deposits that it had lost. The decision on FIB indicates the measure that FIB planned to undertake: focusing on customer communications and deepening customer relationships, preparing frontline and back-office personnel to

92. Hypo Real Estate (HRE), C15/2009, 18 July 2011, para. 90.
93. HSH Nordbank, SA.29338, 20 September 2011, para. 220.
94. HSH Nordbank, SA.29338, 20 September 2011, para. 30.
95. Deposits are considered as a stable source of funding. Retail deposits are sometimes referred to as "sluggish" (Huang & Ratnovski 2010, p. 3). The 'sluggishness' of retail deposits can be explained by the fact that retail deposits are – up to a certain amount – insured by the government.

minimise operational risk, monitoring closely deposit inflows/outflows, with clear mechanisms for early warning, escalation, and proactive management of customers.[96]

The deposit base can also be increased by means of an acquisition. This is clearly demonstrated in the OVAG-case. Österreichische Volksbanken-AG (OVAG) was heavily reliant on wholesale funding. One of the Volksbanken of OVAG acquired Livebank. This gave OVAG access to EUR 470 million of retail funding. The Commission noted positively that the acquisition reduced OVAG's past reliance on wholesale funding.[97] Similarly, the Hungarian FHB acquired Allianz. The Commission concluded that this acquisition contributed to FHB's long-term viability.[98] The acquisition of Allianz led to an increase in retail and commercial deposits. This growth in deposits contributed to diversifying the funding sources of the bank (thereby reducing FHB's dependence on wholesale funding).[99] In total, there are 6 cases in which the Commission noted that the liquidity position of the bank (and thus its viability) was improved by means of an acquisition of another bank.[100]

Deleveraging the balance sheet

The second strategy to reduce the bank's overreliance on wholesale funding consists of deleveraging the balance sheet. A balance sheet reduction – such as a reduction of the size of the bank's loan book – will result in a reduction of the funding needs. Consequently, the bank should be better able to satisfy its funding needs by its deposits and it should be less dependent on wholesale funding.

This solution to the funding problem is mentioned in several Commission decisions. For instance, in its decision on Banca Monte dei Paschi di Siena (MPS), the Commission explicitly indicated that the balance sheet reduction envisaged in the restructuring plan would contribute to the reduction of funding needs.[101]

96. First Investment Bank (FIB), SA.39854, 25 November 2014, para. 39.
97. Österreichische Volksbanken-AG (OVAG), SA.31883, 19 September 2012, para. 48 and 103.
98. FHB, C37/2010, 22 February 2012, para. 79.
99. FHB, C37/2010, 22 February 2012, para. 74-75. The Commission took into account that FHB and Allianz both operated in the same retail and commercial markets, because this meant that the State aid to FHB was not used to develop activities in new business areas (FHB, para. 79).
100. These cases are: OVAG (19 September 2012, para. 48 and 103), FHB, Alpha Bank (para. 224), Eurobank (para. 333), Pireaus Bank (para. 281), the combination of FBN and ABN AMRO N (para. 305).
101. Banca Monte dei Paschi di Siena (MPS), SA.36175, 27 November 2013, para. 71.

Integration into a larger bank

Another solution to the funding problem is to transfer the ailing bank to another bank with a good financing capacity. This can be illustrated by the case of Kaupthing Bank Luxembourg. This was a subsidiary of the Icelandic banking group Kaupthing Bank. The causes of Kaupthing Bank Luxembourg's difficulties were inextricably linked to the collapse of its parent company in Iceland and its inability to finance itself as a result. The Commission considered that the sale to a buyer with adequate financing capacity would remedy the bank's (funding) problems.[102]

Similarly, in the case of Fortis, the Commission considered that once Fortis Bank would form part of BNP Paribas, Fortis Bank would no longer have any difficulty raising finance.[103]

11.6.3.3 Banks without a funding problem

Not all beneficiary banks had funding problems. In several decisions, it is underlined that the beneficiary bank did not have funding problems. For instance, the Commission noted that Commerzbank had a stable base of customer deposits[104] and that Landesbank Baden-Württemberg (LBBW) had a diversified financing mix.[105] Likewise, the Commission noted that NordLB was well-positioned to fund itself.[106] In that case, the Commission noted positively that throughout the crisis the bank was able to issue debt on the capital markets without State support and is in a good position to obtain funding in the future.[107] Another example is the decision on the Belgian bank KBC. KBC had a relatively limited reliance on funding from capital markets.[108] This was based on the fact that 64% of KBC's debt instruments were of a duration of longer than 1 year. The decision on KBC also mentions that KBC did not suffer from any liquidity problems. Other examples are the decision on BAWAG ("strong liquidity position")[109] and the 2010 decision on SNS REAAL ("relatively well-diversified funding strategy").[110] In total, there are 9 decisions in which the Commission explicitly indicated that the bank did not have any funding problems.[111]

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102. Kaupthing Bank Luxembourg, N344/2009, 9 July 2009, para. 70.
103. Fortis Bank, NN42/2008, 3 December 2008, para. 84.
104. Commerzbank, N244/2009, 7 May 2009, para. 62.
105. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 37 and 72.
106. NordLB, SA.34381, 25 July 2012, para. 141. See also para. 142 with respect to NordLB's funding needs in USD.
107. NordLB, SA.34381, 25 July 2012, para. 141.
108. KBC, C18/2009, 18 November 2009, para. 49.
109. BAWAG, N261/2010, 30 June 2010, para. 87.
110. SNS REAAL, N371/2009, 28 January 2010, para. 49.
111. These cases are: BAWAG, KBC, Commerzbank, LBBW, NordLB, SNS REAAL (2010), ING, Abanka, Cajatres.

11.6.4 Concluding remarks

For a bank, funding is key (see subsection 11.6.1). The most conspicuous finding of the present section is that funding issues are not mentioned in every decision (see subsection 11.6.2). In that regard, there is a remarkable contrast in the Commission's approach to corporate governance problems and its approach to funding problems. As was discussed in section 11.3.2, the Commission does not mention that a bank does not have corporate governance problems.[112] By contrast, as is shown in subsection 11.6.3, the Commission does sometimes mention that a bank does not have funding problems.[113] This happened in 9 decisions. This makes it all the more surprising that there are 36 decisions that omit to mention funding issues. In my opinion, the omission to mention the relevant characteristic in these 36 cases amounts to an inconsistency.

This inconsistency can be avoided in future bank State aid cases if the Commission always mentions funding issues in its decisions. In other words: the decision should either indicate i) that the bank did not have funding problems, ii) that the bank had funding problems and has committed to improve its funding strategy, or iii) that the bank had funding problems but did not improve its funding strategy. Situation (i) and (ii) will be noted positively by the Commission, while situation (iii) will be noted negatively. Thus far, situation (i) is only mentioned in 9 cases. My recommendation to the Commission would be to always mention funding issues – and thus also when situation (i) occurs.

11.7 Operational efficiency

* *The fact that the beneficiary bank has implemented cost-cutting measures.*

11.7.1 Why is this a relevant characteristic?

Long-term viability means that the bank must have a sufficient level of profitability. In order to improve operational efficiency (and thus profitability), most beneficiary banks have implemented cost-cutting measures (or "cost optimization measures").[114] This is thus a relevant characteristic from a viability-perspective.

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112. This corresponds to "situation A/O" of the matrix.
113. This corresponds to "situation A/M" of the matrix.
114. It should be pointed out that cost-cutting measures are not an exclusive feature of State-aided banks: many banks that did not need State aid also decided to implement cost-cutting measures.

In addition, the fact that the bank has implemented cost-cutting measures is also relevant from another perspective: that of burden-sharing. As will be explained in chapter 12, the second pillar of the Restructuring Communication requires that beneficiary banks contribute to the restructuring costs. This is referred to as burden-sharing or an own contribution. In that regard, cost-cutting measure constitute a contribution to the restructuring costs through internal resources (thus an "own contribution"). To give an example, in the decision on Abanka, the Commission noted that "as regards covering the restructuring costs associated with the implementation of the restructuring plan through Abanka's internal measures, Abanka will carry out cost-cutting measures".[115]

Thus from both a viability-perspective and a burden-sharing perspective, the fact that the bank has implemented cost-cutting measures is a relevant characteristic.

11.7.2 Has the Commission consistently taken into account this relevant characteristic?

The table in Annex VII gives an overview of the cases characterised by cost-cutting measures. In almost every restructuring decision in the C-context, it is mentioned that the beneficiary bank has implemented cost-cutting measures. In the other contexts, this relevant characteristic cannot be found. This can be explained by the fact that operational efficiency is primarily important in the C-context; it is less important in the W-context. Indeed, if a bank is to be wound-down, then there is less need for measures that improve the operational efficiency of the bank. Admittedly, operational efficiency is also important in the T-context and S/T/W-context; but in these contexts, operational efficiency is usually achieved by cost synergies resulting from the integration of (part of) the beneficiary bank in the acquiring bank.[116]

To conclude, cost-cutting measures are not mentioned in every decision, but this can be explained by the relevant context.

115. Abanka, SA.38228, 13 August 2014, para. 142.
116. See section 11.10.

11.7.3 How is this relevant characteristic elaborated in the decisions?

Usually, the decisions provide some basic information on the different modalities of the cost-cutting measures.

Firstly, it is usually indicated *how the cost-cutting will be achieved*. For instance, in the decision on Caixa Geral de Depósitos (CGD), the Commission noted that “a reduction of the bank’s headcount and the renegotiation of contracted services are the main levers to achieve additional savings”.[117] In its decision on Nova Kreditna Banka Maribor (NKBM), it was indicated that the cost-reduction was achieved “through a significant consolidation of its business premises and branch network, a reduction in personnel, improved operational efficiency, the acquisition of clients on a risk-adjusted profitability-driven basis, optimisation of liquidity costs by pooling treasury positions and optimisation of other costs”.[118]

Secondly, the *timeframe* of the cost-reduction programme is mentioned. To give an example, the decision on Nova Ljubljanska banka (NLB) indicated that NLB would reduce its operating costs to EUR [300-350] million by 31 December 2014, EUR [300-350] million by 31 December 2015, EUR [250-300] million by 31 December 2016 and to EUR [200-250] million by 31 December 2017.[119]

Thirdly, the *extent of cost-cutting* is indicated. This can be in absolute terms and in relative terms. For example, the decision on Banco Mare Nostrum (BMN) indicates that the cost-cutting measures would result in a reduction of annual operational costs by approximately EUR [200 – 300] million, which would correspond to a decrease of approximately [30 – 40]% when compared to 2012 levels.[120]

Related to the extent of cost-cutting is the cost/income ratio that would be achieved by the cost-cutting measures. In some decisions, it is mentioned that the bank is aiming at a certain cost/income ratio. In that regard, the decision on BMN indicates the following:

> “BMN had a cost/income ratio of 77,7% in 2011, high in comparison to its peers. BMN plans to reduce that ratio via a significant reduction in its branch network and personnel. The Restructuring Plan projects a new cost/income ratio of [40 – 50]% in 2017”.[121]

117. Caixa Geral de Depósitos (CGD), SA.35062, 24 July 2013, para. 29.
118. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 126.
119. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 47.
120. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 149.
121. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 134.

Although the decision on BMN mentions the cost/income ratio that BMN was aiming at, the decision does not mention whether this cost/income ratio was sufficient.[122] This observation applies to most decisions. Indeed, there are only a few decisions in which the Commission explicitly considered the cost/income ratio to be satisfactory. One of these decisions is the decision on BayernLB, in which the Commission noted the following:

> "BayernLB projects a [15-30]% decrease in costs over the restructuring period, leading to an end cost/income ratio of [30-60]%. That level is in line with those of other aided banks. The Commission considers that an improvement of the cost/income ratio is necessary for the return to viability. Given the business model of BayernLB, which does not operate retail branches (retail branches tend to increase the cost/income ratios of retail banks), the historical levels of the cost/income ratio cannot be considered sustainable".[123]

The Commission thus explicitly assessed the cost/income ratio in the case of BayernLB. By contrast, in most other decisions, the Commission did not explicitly consider whether the cost-cutting measures were sufficient. It only welcomed the cost-cutting measures (without evaluating the exact modalities of the cost-cutting measures).[124]

To conclude, even though information is given on the modalities of the cost-cutting measures, the Commission does not seem to draw any conclusions from it. While it is safe to assume that the extent of cost-cutting should be higher for a greatly inefficient bank than for a reasonably efficient bank, the extent of cost-cutting was never used as a reason to dismiss a cost-cutting measure as inadequate. In fact, cost-cutting measures were never dismissed as insufficient.

11.7.4 Concluding remarks

The Commission welcomes cost-cutting measures (see subsection 11.7.1). Thus, the fact that the bank has implemented cost-cutting measures is a relevant characteristic, but the same cannot be said for the modalities of the cost-cutting

122. Also in the context of burden-sharing, the Commission does not explicitly refer to the modalities of the cost-cutting measures. The mere fact that the bank implements cost-cutting measures seems to suffice.
123. BayernLB, SA.28487, 5 February 2013, para. 175. Another example is NordLB, SA.34381, 25 July 2012, para. 151: "Consequently the bank is to achieve a cost-income ratio of [< 50]%, which the Commission considers satisfactory."
124. Should the percentage of cost-reduction not be taken into account? For some other measures, the percentage matters greatly. The prime example in that regard is the balance sheet reduction. However, unlike a balance sheet reduction – which is a compensatory measure – a cost-reduction is primarily a viability measure. It is not aimed at restoring the level playing field, but aimed at restoring the viability of the bank.

measures, such as the extent of cost-cutting. Although the extent of cost-cutting is mentioned in the decision, it is not explicitly taken into account in the assessment of the viability and burden-sharing (see subsection 11.7.3). There are a few exceptions, such as the aforementioned example of BayernLB. In my opinion, the decision on BayernLB shows how – in future bank State aid cases – the Commission should take into account the modalities of the cost-cutting measures.

11.8 Business model: focus on core activities

* *The fact that the beneficiary bank will focus on its core activities (and thus divest its non-core activities).*

11.8.1 Why is this a relevant characteristic?

The Restructuring Communication provides that the beneficiary bank should withdraw from activities which would remain structurally loss-making. Many restructuring plans contain the intention that the bank will refocus on its core activities.[125] This means that non-core activities are either run-off or sold (i.e. divested[126]). For instance, the restructuring plan of BayernLB envisaged several changes to the bank's business model and provided for a "strategic realignment of the bank".[127]

Apart from the fact that divestments contribute to the bank's refocusing on its core activities, divestments can also have other positive effects. In the first place, divestments reduce the amount of RWA and therefore free up capital and increase the capital ratios. In the second place, divestments generate liquidity which can be used to finance the restructuring or to strengthen the liquidity basis.[128] In the third place, divestments can free up management capacities. Subsequently, these management capacities can be reemployed in the core business of the bank.[129]

125. Although 'business model' can be understood as comprising both funding issues and the activities that are funded, the current section focusses only on the bank's activities. The funding issues were discussed in section 11.6.
126. NB: in the decision on NLB (annex point 4.1), "divested" was explained as "sold, liquidated or wound down".
127. BayernLB, SA.28487, 5 February 2013, para. 50.
128. WestLB, C43/2008, 12 May 2009, para. 77.
129. Österreichische Volksbanken-AG (OVAG), SA.31883, 19 September 2012, para. 101.

It is worth stressing that divestments are not only important from a viability-perspective, they are also important in relation to the other two pillars of the restructuring plan: i.e. own contribution (see section 12.3) and limiting competition distortions (see sections 13.5 and 13.6). The current section only discusses divestments in as far as they contribute to the restoration of long-term viability.

11.8.2 Has the Commission consistently taken into account this relevant characteristic?

At the outset, it should be noted that only in the C-context, it is necessary to explicitly point out that the bank will focus on its core activities and terminate its non-core activities. In other contexts, the focus on the core activities or the termination of the non-core activities is already implied. Indeed, in the W-context, all activities are categorised as non-core (and subsequently terminated), while in the S-context, the bank is split-up into a good bank (which comprises the core activities) and a bad bank (which comprises the non-core activities).

Thus, the current relevant characteristic is only relevant in the C-context. As can be seen in the table in Annex XII, most cases in the C-context are characterised by a focus on the core activities.

11.8.3 How is this relevant characteristic elaborated in the decisions?

A refocus on the bank's core activities means that certain activities are to be discontinued. In that regard, there are two central questions: *Which* activities are discontinued? And *how* are these activities discontinued?

11.8.3.1 Which activities are discontinued?

With respect to the question *which* activities are discontinued, the simple answer is: "non-core activities". This, in turn, raises the following question: what are non-core activities? Non-core activities are usually negatively defined as all activities that are not core activities.[130]

Naturally, non-core activities are likely to be different for each bank. It all depends on the bank's business model and what the bank designates as 'core' and 'non-core'. However, several general conclusions can be drawn from the decisional practice of the Commission. In the *first* place, some activities – most notably proprietary trading activities – are usually categorised as "non-core" (and thus terminated). In the *second* place, when the beneficiary bank operates

130. Sometimes, a more direct description can be found: the decision on the Slovenian bank Abanka (SA.38228, 13 August 2014, para. 36) indicates that non-core activities concern activities "where the weakness of Abanka's knowledge of those markets has led to inadequate risk assessment in the past."

internationally, some (or all) of its foreign activities are discontinued. In the *third* place, organisational structure is sometimes used as an argument to terminate certain activities. This is most prominent in cases of financial groups that combine banking and insurance activities ("bancassurance"). These three general conclusions will be discussed below.

Type of activities

It can be observed that *proprietary trading* activities are usually terminated.[131] Proprietary trading – sometimes referred to as 'trading for own account' – is the purchase and sale of financial instruments with the intent to profit from the difference between the purchase price and the sale price.[132]

It should be noted that, apart from proprietary trading, there are no activities that are standard categorised as 'non-core'. Activities that are sometimes labelled as 'non-core' are: credit swap activities[133], structured investment activities[134], leasing[135], factoring/forfeiting[136], infrastructure finance[137], real estate activities[138], shipping financing and aircraft financing.

These activities have been mentioned as 'non-core activities', but the decisions usually do not explain in detail why these activities are non-core. However, there are a few decisions that elaborate upon the non-core nature of certain activities. For instance, in the Restructuring Decision on HSH Nordbank, the Commission mentioned that several business segments of HSH Nordbank, such as shipping financing and aircraft financing, were *cyclical and volatile* in nature.[139] The Commission considered the relative importance of shipping

131. This is the case in: KA, OVAG, Dexia, CCB, NordLB, Sparkasse KolnBonn, SachsenLB, HSH Nordbank, BayernLB, ATE, MPS, CGD, BPI, BCP.
132. In the Proposal for a Regulation on structural measures improving the resilience of EU credit institutions, proprietary trading is defined as follows: "proprietary trading" means using own capital or borrowed money to take positions in any type of transaction to purchase, sell or otherwise acquire or dispose of any financial instrument or commodities for the sole purpose of making a profit for own account, and without any connection to actual or anticipated client activity or for the purpose of hedging the entity's risk as result of actual or anticipated client activity, through the use of desks, units, divisions or individual traders specifically dedicated to such position taking and profit making, including through dedicated web-based proprietary trading platforms.
133. Commerzbank, N244/2009, 7 May 2009, para. 94.
134. Commerzbank, N244/2009, 7 May 2009, para. 94.
135. Hypo Group Alpe Adria (HGAA), SA.32554, 3 September 2013, para. 120; NLB, para. 43.
136. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 43. This was also mentioned as a compensatory measure (see para. 58 and 166).
137. Österreichische Volksbanken-AG (OVAG), SA.31883, 19 September 2012, para. 98.
138. Österreichische Volksbanken-AG (OVAG), SA.31883, 19 September 2012, para. 98.
139. HSH Nordbank, SA.29338, 20 September 2011, para. 223-224. In footnote 70 of the HSH Nordbank-decision, the Commission explained the terms 'cyclical' and 'volatile'. "Cyclical activities are activities whose performance is closely linked to the economic cycle. Volatile activities are activities which show large differences in performance from one period to another."

and transport financing as problematic.[140] The Commission therefore welcomed the fact that pursuant to the restructuring plan, HSH Nordbank would end its aircraft financing activities.

International activities

Many banks operate internationally. The domestic market is usually the core market of the bank. This is reflected in the restructuring plans that provide for a re-focus on the domestic market of the bank. This means that some of the bank's foreign subsidiaries are to be divested.

To give an example, in August 2013, Alpha Bank – a Greek bank – sold its (unprofitable) subsidiary in Ukraine.[141] Likewise, OVAG's difficulties were attributable to its exposure to Central and Eastern European countries (CEE).[142] The divestments of these activities therefore contributed to OVAG's viability. In contrast to OVAG, the Belgian bank KBC did not divest its activities in the CEE countries.[143] This illustrates that non-core activities are different for each bank.

Bancassurance

Many banking groups pursue several kinds of activities. Some of them are not only active in banking, but they also have insurance activities. The combination of banking and insurance within one group is known as 'bancassurance'. By combining banking and insurance, economies of scope can be achieved. Selling insurance products through the banking retail channel might result in cost economies of scope.[144] In addition, banks that have acquired information about their customers (for instance information regarding their creditworthiness) can sometimes reuse that information by selling other financial products to those customers.[145]

In the Dutch context, the two prime examples of the bancassurance-model were ING and SNS REAAL. ING was the mother holding company that controlled 100% of ING Bank N.V. and ING Verzekeringen N.V. The restructuring plan of ING envisaged that ING would only pursue banking activities, while the insurance activities would be divested over time.[146] Similarly, the bankinsurance holding company SNS REAAL had to divest its insurance subsidiary.

140. In the Opening Decision (HSH Nordbank, C29/2009, 22 October 2009, para. 50), the Commission had already indicated that the importance of the shipping activities for HSH Nordbank was problematic for its return to viability.
141. Alpha Bank, SA.34823, 9 July 2014, para. 278.
142. Österreichische Volksbanken-AG (OVAG), 19 September 2012, para. 98.
143. KBC, C18/2009, 18 November 2009, para. 148.
144. Elsas, Hackethal & Holzhäuser 2010, p. 1.
145. Elsas, Hackethal & Holzhäuser 2010, p. 1.
146. ING, C10/2009, 18 November 2009, para. 49.

The Commission noted that "that divestment will simplify the business model of the remaining entity. For instance, as a result of the insurance divestment the double leverage will disappear".[147] Thus, there are two reasons in favour of divesting the insurance subsidiary. In the first place, this divestment *simplifies the organizational structure and business model* of the remaining entity. In the second place, this *eliminates the double leverage*. A double leverage means that the mother holding company uses debt as equity capital in its subsidiaries.

Other cases that feature the divestment of the insurance activities are CGD[148], IL&P[149] and NKBM.[150] Conversely, the Belgian insurance group Ethias committed to divest its banking subsidiary Ethias Banque. This divestment was consistent with the aim of restructuring to refocus on Ethias' core insurance activities.[151]

It is important to point out that the divestment of the insurance division is not always a viability-measure. This can be illustrated by the case of Bank of Ireland.[152] Bank of Ireland provided life insurance and pensions in Ireland through New Ireland Assurance Company (NIAC), operating through the branch banking network. Originally, the restructuring plan of Bank of Ireland

147. SNS REAAL, SA.36598, 19 December 2013, para. 80.
148. Caixa Geral de Depositos (CGD), SA.35062, 24 July 2013. The restructuring plan of Caixa Geral de Depositos (CGD) envisaged the sale of CGD's insurance activities ("Caixa Seguros"). This sale was part of the deleveraging of CGD's balance sheet. It was further provided that Caixa Seguros would be restructured in order to improve its marketability. In recital 90, the decision mentions that the divestment of Caixa Seguros would contribute to the bank's restoration of viability, but it is not clearly explained why.
149. PTSB, SA.33442, 9 April 2015. Irish Life & Permanent Group Holdings (now called Permanent TSB, "PTSB"), sold its life assurance business Irish Life in June 2012. In the final decision of 4 April 2015, the sale of Irish Life was considered as one of the restructuring measures already implemented by PTSB.
150. NKBM, SA.35709, 18 December 2013. Nova Kreditna Banka Maribor (NKBM) was a universal bank which was active in banking and insurance. The insurance activities accounted for 11,7% of NKBM's assets. The restructuring plan of NKBM provided for a significant reduction of NKBM's non-core activities; this encompassed the sale of NKBM's insurance activities.
151. Ethias, N256/2009, 20 May 2010, para. 122.
152. Similarly, in the decisions on Alpha Bank, Eurobank and RBS, the (potential) divestment of the insurance activities was also approached from an own contribution perspective – rather than from a viability-perspective. RBS was a large banking group which also included an insurance division (RBS Insurance), which RBS committed to divest. See: Royal Bank of Scotland (RBS), 14 December 2009, para. 68, 93, 215 and 250. In the decision on Alpha Bank, the Commission established that Alpha Bank sold its insurance activities in 2007. When assessing the own contribution of the bank, the Commission considered that Alpha Bank had no significant activity in that market which could be sold to generate resources. Also in the decision on Eurobank (SA.34825, 29 April 2014, para. 388), it was mentioned in the context of the bank's own contribution, that the bank had given the commitment that it would sell its large and profitable insurance subsidiary.

envisaged that it would divest its life assurance business (NIAC).[153] It is noteworthy that this divestment was not mentioned as a viability-measure, but rather as an own contribution-measure and compensatory measure. In recital 214 of the 2010 Restructuring Decision, the Commission held that the divestment of NIAC would contribute to compliance with point 24 of the Restructuring Communication, which requires that banks should first use their own resources to finance restructuring (by, for instance, the sale of assets).[154] The fact that Bank of Ireland would exit the Irish insurance market was also mentioned in the assessment of the compensatory measures. The divestment of NIAC would result in a reduction of Bank of Ireland's balance sheet and of Bank of Ireland's market presence. [155]

Bank of Ireland faced difficulties to meet its commitment to divest NIAC within the deadline period.[156] The Irish authorities therefore requested to replace the NIAC measure with other measures. In the Amendment Decision, the Commission considered the proposed replacement measures to be adequate "as they pursue the same objective as the NIAC measure, which is the *limitation of the distortion of competition*".[157] This recital clearly illustrates that the divestment of the insurance division is treated as a compensatory measure – and thus not as a viability-measure. Moreover, the Commission considered that divesting NIAC would even undermine BOI's ability to return to profitability in the short term, because NIAC was a profitable subsidiary.[158] Pursuant to this Amendment Decision, Bank of Ireland could pursue its bancassurance model.[159]

The Commission is thus not adamantly opposed to the bancassurance model. This is reflected by the fact that the Commission did not require a divestment of the insurance division in every bank State aid case. Indeed, there were some banking groups that were allowed to retain their bancassurance model. KBC is such a banking group. The Commission explicitly indicated that it considered that KBC's business strategy, which consisted of retail activities combined with

153. Bank of Ireland, N546/2009, 15 July 2010, para. 55-57.
154. Bank of Ireland, N546/2009, 15 July 2010, para. 214.
155. Bank of Ireland, N546/2009, 15 July 2010, para. 248.
156. In 2011, the Commission adopted a second Restructuring Decision on Bank of Ireland. In this decision (SA.33443, 20 December 2011, para. 182), the deadline for the divestment of NIAC was extended by one year (in view of the difficult situation in the Irish markets and the lack of appetite for corporate acquisitions). Bank of Ireland.
157. Bank of Ireland, SA.36784, 9 July 2013, para. 46.
158. Bank of Ireland, SA.36784, 9 July 2013, para. 41.
159. Bank of Ireland's Annual Report indicated the following: "In July 2013, the European Commission agreed to amend our EU approved Restructuring Plan so that we could retain New Ireland Assurance Company plc (NIAC) but imposed replacement substitution measures. NIAC is the number two provider in the life, pensions and investment market in Ireland, part of our very strong *bancassurance* model." 2013 Annual Report of Bank of Ireland, p. 9.

cross-selling of insurance products in KBC's core markets, was a viable business model.[160] Similarly, the restructuring plan of Lloyds Banking Group (LBG) did not envisage the divestment of the insurance division. This is somewhat surprising, because another British bank – namely Royal Bank of Scotland (RBS) – had to divest its insurance division. The decision on LBG did not explain why LBG was allowed to retain its insurance division.

11.8.3.2 How are the non-core activities discontinued?

With respect to this question, it can be observed that non-core activities are either *run-off* or *sold*. To that end, several banks have set up an internal resolution division ("non-core unit"). The assets allocated to this non-core unit will be run down. Several names are used for this non-core unit: Legacy Unit, internal resolution division, internal winding-up segment, wind-down entity or "Abbaugesellschaft". A winding-up segment is not legally separated, but it is to be managed as a segment in its own right with separate accounting in the sense of its own reporting procedure.[161] The rationale of setting up a non-core unit is explained in the following recital from the decision on Nova Ljubljanska banka: "That separation will also allow it to implement a more specialised approach to running off the bank's non-core business and to manage its non-performing assets so as to maximise recovery value".[162]

With respect to the question *how* activities are discontinued, it can be concluded that it does not really matter if activities are divested or run down. For the viability-assessment, the central element is *that* the bank withdraws from certain activities.

The Amendment Decision in the case of KBC is illustrative of the fact that from a viability-perspective, it does not really matter if activities are divested or wound-down.[163] In 2011, the Belgian State and KBC requested the Commission to change certain measures of the restructuring plan approved by the Commission in the Restructuring Decision. In particular, KBC proposed to wind-down Romstal instead of divesting it. In the Amendment Decision[164], the Commission recalled that the divestment of Romstal was proposed by KBC in the context of the rationalisation of it business and a focus on its core

160. KBC, C18/2009, 18 November 2009, para. 148.
161. Österreichische Volksbanken-AG (OVAG), SA.31883, 19 September 2012, annex point 2.
162. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 135.
163. From the perspective of competition, this may be different. For instance, in the Amendment Decision on Commerzbank (N244/2009, 30 March 2012, para. 29), the Commission noted the following: "as the existing business put into run-down mode is not transferred to a competitor, the new commitment does not immediately free up as much market share as a sale of Eurohypo would have".
164. KBC, SA.29833, 27 July 2011, para. 66-72.

markets. The Commission concluded that the wind-down of Romstal instead of its divestment would lead to the same result as envisaged in the Restructuring Decision.

The importance of withdrawing from activities is also reflected by the fact that restructuring plans that are based on an expansion of activities are not accepted by the Commission. This can be illustrated by the Opening Decisions in the cases of Parex banka and Anglo Irish Bank. The Commission noted that the initial restructuring plan for Parex banka seemed to be built on an expanding business strategy for all lending segments.[165] Moreover, the plan did not provide for abandoning or significant reduction of more risky activities.[166] This was one of the reasons for opening the formal investigation procedure. The original restructuring plan for Anglo Irish Bank envisaged a split-up into a New Bank and Old Bank. The New Bank would engage in new activities. The Commission, however, had doubts regarding these diversification activities. The Commission noted that Anglo was at that moment not active on these markets and that Anglo therefore lacked the required expertise.[167] These two examples underline the importance that the Commission attaches to the focus on core activities.

11.8.4 Concluding remarks

Most restructuring plans of banks (in the C-context) include a re-focus on the bank's core activities. This refocus on the bank's core activities – and the subsequent disposal of the bank's non-core activities – is always viewed positively by the Commission, because it contributes to the restoration of long-term viability.

The present section has shown that there is no uniform definition of 'non-core activities'. The exact interpretation of 'core' and 'non-core' is different for each bank. Apart from the fact that it usually treats proprietary trading as a non-core activity, the Commission does not impose a uniform business model on the banks. In other words: banks and Member States have some flexibility in designing the business model of the bank. I welcome the fact that the Commission does not dictate which bank activities should be labelled as core and non-core. Indeed, it is not for the Commission – as a State aid control authority – to determine the business model of the bank.

165. Parex banka, C26/2009, 15 September 2010, para. 98.
166. According to the decision, lending to high net worth individuals in CIS countries is considered to be a risky activity.
167. Anglo Irish Bank, SA.32504, 31 March 2010, para. 117.

11.9 Impaired assets

** The fact that the bank participates in an Asset Protection Scheme or has transferred impaired assets to an Asset Management Company.*

11.9.1 Why is this a relevant characteristic?

The transfer of impaired assets to an Asset Management Company (AMC) is a State aid measure.[168] At the same time, it is a measure that contributes to the restoration of the viability of the beneficiary bank. Indeed, as a result of the transfer, the beneficiary bank will be relieved of its impaired assets.[169] Hence, from a viability-perspective, the Commission thus welcomes the fact that the impaired assets are transferred to an AMC. The same holds true for other asset relief measures, such as an Asset Protection Scheme or the creation of a bad bank.

11.9.2 Has the Commission consistently taken into account this relevant characteristic?

Since the Commission applies the Impaired Assets Communication (IAC) to all cases that are characterised by asset relief measures, the decisions thus explicitly mention the fact that the bank benefited from asset relief measures. Conversely, there are no decisions in which the Commission explicitly mentioned that the bank did not benefit from asset relief measures. So the Commission always mentions the presence of the characteristic if the characteristic is present[170], whereas the Commission does not mention the absence of the characteristic if the characteristic is not present.[171] The omission to mention this absence does not amount to an inconsistency, because it is obvious that the omission means that the relevant characteristic is not present in the case: if the relevant characteristic (i.e. an asset relief measure) would be present, then it is not in question that the Commission would assess this asset relief measure under the State aid rules and thus mention the presence of the relevant characteristic in the decision.

168. The transfer of impaired assets needs to comply to the conditions of the Impaired Assets Communication. In chapter 9, the Impaired Assets Communication was discussed.
169. Furthermore, transferring impaired assets to a State-sponsored SPV results in a reduction of the beneficiary bank's balance sheet and RWA. Since it reduces the bank's RWA, the capital ratio of the bank will improve.
170. This corresponds to "situation P/M" of the matrix.
171. This corresponds to "situation A/O" of the matrix.

11.9.3 How is this relevant characteristic elaborated in the decisions?

It can be observed that – in addition to assessing the compatibility of an asset relief measure on the basis of the IAC-criteria – the Commission stresses the viability-aspect of an asset relief measure. For instance, in the decision on KBC, the Commission pointed out that the value markdowns on KBC's synthetic CDO portfolio were the main cause of the bank's difficulties.[172] Consequently, the restructuring plan of KBC had to address the problems of KBC's impaired assets.

Similarly, in the decision on Bank of Ireland, the Commission recalled that "loans to the real estate sector were at the source of the principal uncertainties in relation to the asset quality and potential impairments" and that "the transfer of those assets to NAMA would allow a stable activity of the bank without uncertainties regarding potential impairments in the portfolio".[173]

Likewise, in the decisions on the Spanish banks, the Commission considered that "the segregation and transfer of the assets and loans related to the real estate development sector to the AMC is an adequate response to the high concentrations of the Bank's balance sheet on the real estate development sector and level of non-performing assets, and its past expansion outside its core retail banking business and historical core regions".[174]

These are just a few examples, but the pattern is clear: asset relief measures are not only assessed as State aid measures, but also as viability-measures.

<u>*Non-performing loans (NPL's)*</u>

A very specific form of impaired assets are non-performing loans (NPL's). Several beneficiary banks had large portfolios of NPL's. This was especially the case for the Greek and Cypriot banks.[175] This is not surprising, given the fact that the Greek and Cypriot economies were in recession. As a consequence of a recession, the ability of the households and businesses to repay their loans will be impaired. This, in turn, will result in higher loan losses for the banks (increase in the stock of NPL's and lower recovery from the existing NPL's.[176]

The problem of a large portfolio of NPL's can obviously be solved by transferring some of the NPL's to an Asset Management Company. Sometimes, a different solution is chosen: in several cases, *a special unit was created within the bank in order to optimise the monitoring and management of problematic*

172. KBC, C18/2009, 18 November 2009, para. 144.
173. Bank of Ireland, N546/2009, 15 July 2010, para. 190.
174. Catalunya Banc, SA.33735, 28 November 2012, para. 165.
175. NPL's also mentioned in: the Slovenian banks Abanka, NLB, NKBM; the Spanish banks Cajatres, CCM.
176. Cooperative Bank of Peloponnese, 17 December 2015, para. 7.

loans.[177] The creation of such a unit is welcomed by the Commission. The Commission also notes positively that that the resources of that unit will be further reinforced through the redeployment of staff from other functions whereby the group currently maintains spare capacity.[178] Interestingly, in Cyprus, a new legal framework was put in place – as part of the MoU conditionality – to facilitate the seizing and pledging of collateral.[179]

11.9.4 Concluding remarks

This section has shown that impaired asset measures are consistently taken into account by the Commission in its assessment of the bank's return to long-term viability. It should be kept in mind, however, that dealing with impaired assets only means that an existing problem is addressed. The creation of impaired assets in the future should also be prevented. In that regard, it is noteworthy that in addition to indicating how existing NPL's will be managed, several restructuring plans focus on *preventing the origination* of NPL's. This concerns (credit) risk management[180], which was discussed in section 11.5.

11.10 Sale of an ailing bank to another financial institution

* *The fact that the acquiring bank has a strong financial position.*

* *The fact that the acquiring bank is much larger than the ailing bank.*

* *The fact that the acquiring bank has a good track record in extracting synergies.*

* *The fact that only the good parts of the ailing bank are transferred to the acquiring bank.*

11.10.1 Why are these characteristics relevant?

In several cases, the beneficiary bank does not continue as a standalone entity. Instead, the bank is taken over by another bank. For this type of situation, I have coined the term "T-context" (or "S/T/W-context" if only the good parts of the bank are taken over). Point 17 of the Restructuring Communication specifies that "the sale of an ailing bank to another financial institution can contribute to the restoration of long-term viability, if the purchaser is viable

177. CCB, Alpha Bank, Eurobank, NBG, MPS. Also the Irish banks AIB/EBS and IL&P (PTSB) strengthened their credit management by creating a Financial Solution Group and the Mortgage Arrears Resolution Strategy (MARS) rollout.
178. Cooperative Central Bank (CCB), SA.43367, 18 December 2015, para. 87.
179. Cooperative Central Bank (CCB), SA.43367, 18 December 2015, para. 88.
180. In that regard, sometimes the term "reduction of credit delinquency" is used. See, for instance: Banco Comercial Português (BCP), SA.34724, 30 August 2013, para. 37-iv.

and capable of absorbing the transfer of the ailing bank, and may help to restore market confidence".[181] Point 17 further specifies that the acquiring bank should demonstrate that the integrated entity will be viable.[182]

The central requirement is thus that the acquiring bank is *viable* and *capable* of absorbing the transfer of the ailing bank. The conclusion that this requirement is met, is usually based on i) the fact that the acquiring bank has a strong financial position, ii) the fact that the acquiring bank is much larger than the ailing bank, iii) the fact that the acquiring bank has a good track record in extracting synergies, and iv) the fact that only the good parts of the ailing bank are transferred to the acquiring bank. These four circumstances are thus relevant characteristics.

11.10.2 Has the Commission consistently taken into account these four characteristics?

The acquiring bank should be viable and capable of absorbing the ailing bank. This is a central requirement which should be met in every case in the T-context and S/T/W-context. The characteristics of the case are used by the Commission to substantiate the conclusion that this central requirement is met. The previous subsection introduced four relevant characteristics in that regard. These characteristics do not necessarily have to be present in every case. For instance, in the decision on Cajatres (which was taken over by Ibercaja), there was no mention of a track record or experience in integrating companies. Nevertheless, the Commission concluded that Ibercaja (which acquired Cajatres) satisfied the requirement of point 17 of the Restructuring Communication. This illustrates that the acquiring bank does not have to score positive on all aspects; it suffices that some of the four relevant characteristics are present.

181. In the decision on ATE (SA.35460, 3 May 2013, para. 61), the Commission considered that the necessity of the requirement (that the acquiring bank is capable of absorbing the transfer of the ailing bank) is in particular relevant in Greece, where the Memorandum of Economic and Financial Policies (MEFP) has also indicated that some consolidation would be good for the widely dispersed banking.
182. Points 18-21 of the Restructuring Communication concern other aspects of the sale of a bank. Point 18 stipulates that a transparent and open tender procedure ensures equal opportunities to potential bidders. Point 19 concerns merger control issues. Point 20 concerns the question whether the sale of a bank may involve aid to the acquiring bank. Point 21 concerns the alternative of an orderly winding-up.

11.10.3 How are these relevant characteristics elaborated in the decisions?

11.10.3.1 Financial position of the acquiring bank

In order for an acquiring bank to be considered viable, its financial position should be sound. The financial position of a bank has many aspects: the bank's liquidity position, its solvency, the quality of its credit portfolio, its profitability and its efficiency ratio. Hence, all these aspects generally figure in the Commission decisions. For instance, in its decisional practice, the Commission took into account the quality of the acquiring bank's credit portfolio. Regarding this relevant aspect, the Commission has noted positively that the level of non-performing loans (NPL's) of the acquiring bank was "in line with the sector's average"[183], or "well below the sector's average".[184] By the same token, the Commission noted positively that the level of provisioning on NPL's was "well above the sector's average".[185]

A strong *liquidity* position is a relevant aspect, because a strong liquidity position means that the acquiring bank can absorb the taken over bank's funding profile. It should be pointed out that this characteristic is used as an argument to support the conclusion that the acquiring bank is viable and capable of absorbing the ailing bank. There are cases in which this characteristic is not present. Notwithstanding the absence of this relevant characteristic, there may be other circumstances that justify the conclusion that the integrated entity will be viable in the long run. For instance, the Commission noted that the liquidity profile submitted by Banco Sabadell (which acquired Banco CAM) and by BBVA (which acquired UNNIM Banc) exhibited a significant reliance on ECB refinancing facilities. However, the Commission noted that most Spanish banking institutions exhibit such a reliance.[186]

In some decisions, the Commission referred to the bank's rating. For instance, in its decision on Fortis, the Commission mentioned that BNP Paribas (which acquired part of Fortis) had been rated AA+ by S&P.[187] The Commission noted positively that this rating reflected the acquiring bank's financial soundness.

It should be pointed out that there are several ailing banks which were taken over by banks that were also in need of State aid. This occurred in Greece where all the large Greek domestic banks had received State aid and were subject to restructuring. Since subsidiaries of foreign groups did not have interest in

183. AB Ukio bankas, SA.36248, 14 August 2013, para. 73.
184. Banco de Valencia, SA.34053, 28 November 2012, para. 169.
185. Banco CAM, SA.34255, 30 May 2012, para. 130.
186. Banco CAM, SA.34255, 30 May 2012, para. 138; UNNIM Banc, SA.33733, 25 July 2012, para. 154.
187. Fortis, NN42/2008, 3 December 2008, para. 83.

acquiring the ailing banks in Greece, the Commission exceptionally accepted that beneficiary banks could take over the ailing banks.[188] The impact of the acquisition on the Commission's assessment of the beneficiary bank's restructuring will be discussed in section 11.11.

11.10.3.2 Size of the acquiring bank

The relative size of the acquiring bank (in relation to the size of the bank that is taken over) is a relevant characteristic: the larger the acquiring bank, the more capable it is to absorb the transfer of the ailing bank. Therefore, in many decisions the relative size of the acquiring bank was taken into account.

The relevance of the integration into a larger bank is illustrated by the Opening Decision on Nea Proton Bank. In that decision, the Commission noted that "if the bank was integrated in a larger and solid bank, it would probably give more confidence to depositors and increase the range of services offered to them, such that the bank would not have to continue offering interest rates on deposits which are significantly above the rate offered by most competitors".[189]

In most cases, the acquiring bank was much larger than the ailing bank. For instance, Banco de Valencia was taken over by CaixaBank. The Commission noted that CaixaBank was much larger than Banco de Valencia. In terms of total assets, the ratio exceeded 1:15. The Commission therefore considered that the impact of the acquisition of Banco de Valencia on CaixaBanks' accounts and prudential position was limited.[190] This consideration can be found in many other decisions. The exact ratio is, however, not the same. For instance, in the case of Banco Gallego, the ratio exceeded 1:37. An even higher ratio can be found in the decision on the transfer of Banca Romagna Cooperativa (BRC) to ICCREA: the Commission noted that ICCREA was 50 times larger than the transferred activities in terms of total assets.[191]

It is possible that the acquiring bank is not larger than the ailing bank. It can even occur that the acquiring bank is much smaller than the ailing bank that it takes over. For instance, Eik Banki Foroya was taken over by TF Holding. The Commission observed that the assets bought by TF Holding were about five times higher than the total assets held by TF Holding.[192] So the transferred business was absorbed into a smaller bank. However, the Commission noted that there were several measures to ensure the viability of the transferred business within the acquiring bank. The Commission noted that the fact that the

188. T Bank, SA.34115, 16 May 2012, para. 49.
189. Nea Proton Bank, SA.34488, 26 July 2012, para. 69.
190. Banco de Valencia, SA.34053, 28 November 2012, para. 163.
191. Banca Romagna Cooperativa (BRC), SA.41924, 2 July 2015, para. 74.
192. Eik banki, SA.31945, 6 June 2011, para. 38.

FSC retained 30% of Eik Banki Foroya's equity shares contributed to the long-term viability of the bank.[193] The fact that the State remained a shareholder stabilised shareholding and ensured that one shareholder would be a large entity.

Another example is the case of AB Ukio bankas. The assets and liabilities of Siauliu bank (i.e. the acquiring bank) had almost doubled following the takeover of assets and liabilities from Ukio bank. The Commission did not consider this to be an impediment to Siauliu bank's ability to manage the business of the combined banks. This was explained by the fact that the transferred assets were dominated by liquid assets, which would not present any management issues to Siauliu bank.[194]

These examples illustrate that the size of the acquiring bank is a relevant – but not decisive – factor in the assessment of the acquiring bank's viability and capability of absorbing the transfer.

11.10.3.3 Experience of the acquiring bank and synergies

The Commission welcomes the fact that the acquiring bank has experience in integrating companies. For instance, Banco CAM was acquired by Banco Sabadell. When assessing the long-term viability, the Commission noted that Banco Sabadell had a "consistent and favourable track record in buying external retail banking entities and through successful integration, extracting foreseen synergies".[195] Banco Gallego was another bank taken over by Banco Sabadell. Again the Commission noted that Banco Sabadell had a favourable track record.[196]

Likewise, in the case of the Greek bank ATE, the Commission looked favourably at the fact that the acquiring bank (Piraeus Bank) had experience in integrating companies.[197] In the decision, this track record was substantiated by referring to the many activities that were successfully integrated by Piraeus Bank.[198] Furthermore, the Commission took positive note of the fact that Piraeus Bank had developed a very detailed integration plan.[199]

193. Eik banki, SA.31945, 6 June 2011, para. 38.
194. AB Ukio bankas, SA.36248, 14 August 2013, para. 40.
195. Banco CAM, SA.34255, 30 May 2012, para. 128.
196. Banco Gallego, SA.36500, 25 July 2013, para. 116.
197. ATE, SA.35460, 3 May 2013, para. 63.
198. They are listed in footnote 17 of the Decision: "In 1998, Piraeus Bank absorbed the activities of Chase Manhattan Greece, took over a controlling interest in the Macedonia-Thrace Bank and acquired Credit Lyonnais Hellas. One year later in 1999, Piraeus Bank acquired Xiosbank and absorbed the activities of National Westminster Bank Greece. In June 2000, Piraeus Bank integrated its three commercial banks in Greece (Piraeus Bank, Macedonia-Thrace Bank and Xiosbank). Finally, in 2002, Piraeus Bank acquired ETBAbank."
199. ATE, SA.35460, 3 May 2013, para. 63.

A favourable track record in extracting synergies is thus a relevant characteristic. But also apart from this track record, synergies can be achieved. In many decisions, the Commission noted that the takeover and subsequent integration of the ailing bank into the acquiring bank would lead to important synergies. For instance, in the decision on AB Ukio Bankas, it was mentioned that according to the integration plan, the combined entity would reap the benefits of synergies.[200]

It is noteworthy that the synergies are not really specified. The most detailed explanations can be found in the decision on ATE. The decision mentions cost synergies (through branch and staff reductions and IT-integration), funding synergies and revenue synergies.[201] In addition, the Commission noted that the integration would improve the deposit mix and rebalance the loan book.[202]

11.10.3.4 S/T/W-context

A very decisive argument is the fact that only the good parts of the ailing bank are transferred to the acquiring bank. This argument mainly applies in the S/T/W-context, when a bank is split-up into a good bank (to be transferred) and a bad bank (to be wound-down).

The Amagerbanken-case illustrates that the Commission is satisfied that the integrated entity will be viable, if only the good parts of the ailing bank are transferred to the acquiring bank.[203]

The same consideration can be found in the Dunfermline-decision. The Commission observed that the Dunfermline business transferred to Nationwide was a viable business: the Transfer Package consisted of good quality assets and a good funding position (loan to deposit ratio of 45%).[204] In addition, since the impaired assets stayed with Rump Dunfermline, the Dunfermline business transferred to Nationwide was cleansed of its impaired assets.[205]

In the case of Fionia Bank, the Commission noted that only the viable, less risky parts were transferred to Nordea. The Commission underlined this by referring to the fact that Nordea had explicitly selected the parts according to their risk profile and that Nordea had purchased only the parts where there was no evidence of impairment.[206]

200. AB Ukio bankas, SA.36248, 14 August 2013, para. 74.
201. ATE, SA.35460, 3 May 2013, para. 35.
202. On a standalone basis, Piraeus Bank's loan portfolio contained 71% business loans, 20% residential loans and 9% consumer loans. After the integration, the corresponding figures would pro forma be 62% business loans, 28% residential loans and 9% consumer loans. (ATE, SA.35460, 3 May 2013, para. 36).
203. Amagerbanken, SA.33485, 25 January 2012, para. 104.
204. Dunfermline, NN19/2009, 25 January 2010, para. 100.
205. Dunfermline, NN19/2009, 25 January 2010, para. 101.
206. Fionia Bank, N560/2009, 25 October 2010, para. 73.

11.10.4 Concluding remarks

As explained in the subsection 11.10.1, the acquiring bank should be viable and capable of absorbing the ailing bank. This is a central requirement which should be met in every case in the T-context and S/T/W-context. Accordingly, the Commission always assesses in these cases whether the acquiring bank is viable and capable of absorbing the ailing bank. The conclusion that this requirement is met, is usually based on i) the fact that the acquiring bank has a strong financial position, ii) the fact that the acquiring bank is much larger than the ailing bank, iii) the fact that the acquiring bank has a good track record in extracting synergies, and iv) the fact that only the good parts of the ailing bank are transferred to the acquiring bank.

11.11 Acquisition of other banks by a beneficiary bank

The previous section focussed on the take-over of a beneficiary bank; the current section focusses on the acquisition *by* a beneficiary bank. This situation is quite rare: bank that received State aid are usually not allowed to take over other banks – as will be discussed in chapter 13 in the context of the acquisition ban. The situation of a beneficiary bank acquiring another bank only occurred in the Greek context. There are four large banks in Greece, and each of these four large banks acquired some smaller banks.[207]

The Commission assessed whether these acquisitions were compatible with the Restructuring Communication. This assessment concerned the effect of the acquisitions on: i) the viability of the bank, ii) the aid amount needed by the bank, and iii) competition. Any acquisition is thus assessed from three perspectives. The first perspective (i.e. effect on viability) is discussed in this section, whereas the other two perspectives will be covered in section 13.9.

207. *Pireaus Bank* acquired the ATE Transferred Activities, Geniki, the Cypriot Transferred Activities and MBG. In 2015, *Pireaus Bank* acquired Panellinia Bank. *Alpha Bank* acquired Emporiki Bank, three Cooperative Banks, and Citibank Greece. *Eurobank* acquired New TT Bank and Nea Proton Bank. *National Bank of Greece (NBG)* acquired FB Bank, three Cooperative Banks and Probank.

With respect to the effect of the acquisition on the long-term viability of the bank, the relevant criterion is that the acquisition would enhance – or at least not endanger – the long-term viability of the acquiring bank. In the context of that assessment, the Commission took into account the following circumstances:

– Through the acquisition, the acquiring bank would enhance its deposit gathering franchise and capabilities.
– There were synergies (in terms of central functions, IT services and operating expenses) (or in the form of personnel reduction, branch closures and reduced overhead costs).
– The acquisition can have a positive effect on the liquidity position, if the bank acquires more deposits than net loans. This was the case with the acquisition of Emporiki Bank by Alpha Bank: the LTD-ratio of Emporiki Bank was around 115%, well below Alpha Bank's very high LTD-ratio.[208]
– The acquisition can have a positive effect on the capital adequacy ratio of the acquiring bank.[209]
– The acquisition can give the acquiring bank the opportunity to enhance its revenues by broadening its client base in several geographic areas.[210]
– The acquiring bank acquired the other bank's loans at fair value, and not at book value. That factor limits the risk of future impairments.[211]

It should be noted that some of the banks that were taken over by the beneficiary bank, had also benefited from State aid. In other words: the acquiring bank and the transferred bank were both beneficiaries from State aid. In this situation, the viability-assessment had to be performed twice. On the one hand, the *viability of the transferred activities* had to be assessed. This assessment was based on the characteristics that were outlined in the previous section. On the other hand, it had to be assessed whether the acquisition endangered the *viability of the acquiring bank*. This assessment was based on the characteristics discussed in the current section.

208. Alpha Bank, SA.34823, 9 July 2014, para. 224.
209. Alpha Bank, SA.34823, 9 July 2014, para. 225.
210. Alpha Bank, SA.34823, 9 July 2014, para. 237.
211. Panellinia Bank, SA.41503, 16 April 2015, para. 96.

11.12 Assumptions underlying the restructuring plan

* *The fact that the assumptions (on which the financial projections are based) are reasonable.*

11.12.1 Why is this a relevant characteristic?

The Restructuring Communication provides that the restructuring plan should demonstrate how the bank will restore its long-term viability without State aid as soon as possible. In particular, the restructuring plan should demonstrate that the bank will be able to generate appropriate return on equity, while covering all costs of its normal operations and complying with the relevant regulatory requirements. In order to demonstrate the return to viability, the restructuring plan should contain financial forecasts/projections on the expected revenues, costs, impairments, profits and capital position. The expected results of the restructuring need to be demonstrated under a base case scenario and a stress case scenario.[212] The financial projections under both scenarios are *based on assumptions*, and it is important that those assumptions are reliable or reasonable.[213] Particularly with respect to the *stress test* macroeconomic assumptions, the Commission has considered that these assumptions should be sufficiently severe to be considered to be a stress scenario.[214]

Hence, in its decisional practice, the Commission verifies whether the financial projections used in the restructuring plan are based on reasonable underlying macroeconomic assumptions.

11.12.2 Has the Commission consistently taken into account this relevant characteristic?

It can be observed that the Commission has consistently checked whether the assumptions were reasonable. In other words: the presence of this relevant characteristic is always mentioned in the decisions. This can be explained by the fact that the current relevant characteristic – unlike most of the other relevant characteristics of this chapter – has to be present in every case: in every case, the assumptions and projections have to be reasonable.

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212. Restructuring Communication, point 13. The bank should be able to withstand a stress scenario. This means that the bank will comply with the relevant regulatory requirements even in a stress scenario.
213. Other terms that are used, are: “credible”, “plausible”, “sufficiently pessimistic”, “prudent and conservative”.
214. Lloyds Banking Group (LBG), N428/2009, 18 November 2009, para. 146.

11.12.3 How is this relevant characteristic elaborated in the decisions?

In the final decisions, the Commission always concluded that the assumptions were reasonable. In that regard, the following observation can be made: the assumptions themselves are usually not shown in the decisions.[215] Only the conclusion that the assumptions are reasonable – and the considerations to substantiate that conclusion – figure in the decisions. The most commonly used considerations are discussed below.

A commonly used consideration is that the assumptions were provided by (or reviewed/verified/validated by) the financial supervisory authority. For instance, in the decision on Ethias, the Commission noted that the assumptions underlying the stress case scenario were *provided by the CBFA* (i.e. the Belgian regulator: Commission Bancaire, Financière et des Assurances).[216] Likewise, in the decision on FIB, the Commission positively noted that the assumptions retained for the restructuring plan *were coming from the Bulgarian National Bank* and presented sufficient level of prudence and conservatism.[217]

Another consideration can be found in the case of the Cooperative Central Bank (CCB). In this case, the macro-economic assumptions were *in line with* the macro-economic forecasts used for the Economic Adjustment Programme for Cyprus as agreed between Cyprus and the Commission, the ECB and the IMF.[218]

Considerations that support the conclusion that the assumptions are not reasonable can be found in the Opening Decisions. For instance, in the Opening Decision on BayernLB, the Commission expressed its doubts on the assumptions. "The Commission notes that economic forecasts have deteriorated in a significant manner in recent weeks and the provided forecasts by the bank *are therefore outdated*. While the bank has foreseen such a possibility by using higher risk provisioning than needed in a base case scenario, the Commission has doubts whether this is sufficient for making up for the deteriorating economic forecasts".[219]

215. An exception is the Restructuring Decision on MPS. This decision dedicates an entire section (3.1) to the assumptions.
216. Ethias, N256/2009, 20 May 2010, para. 125.
217. First Investment Bank (FIB), SA.39854, 25 November 2014, para. 126.
218. Cooperative Central Bank (CCB), SA.35334, 24 February 2014, para. 116.
219. BayernLB, N254/2009, 12 May 2009, para. 89. In the Restructuring Decision on BayernLB (SA.28487, 5 February 2013, para. 171-175), a detailed discussion can be found on the assumptions and projections.

Likewise, in the Opening Decision on Parex banka, the Commission considered that the restructuring plan seemed to be depending on *rather optimistic assumptions* as to future operating conditions.[220] The Commission had doubts on the assumptions on the bank's penetration in different market segments.[221]

11.12.4 Concluding remarks

The restructuring plan should be based on assumptions that are reasonable (see subsection 11.12.1). As set out in subsection 11.12.2, the Commission has consistently checked whether the assumptions were reasonable. Although the Commission expressed its doubts in several Opening Decisions, in the Restructuring Decisions, the Commission always concluded that the assumptions underlying the restructuring plan were reasonable (see subsection 11.12.3).

11.13 Conclusion

In each bank State aid case, the Commission assesses whether the restructuring plan will ensure that the long-term viability of the beneficiary bank will be restored. The characteristics that are relevant to that assessment were identified and discussed in the present chapter. What are the key findings and what are their implications for the Commission on the one hand and the Member States and beneficiary banks on the other hand?

11.13.1 Key findings

One of the key findings is that there are many decisions *that do not mention the relevant characteristic*. For instance, section 11.2 revealed that there only 23 Commission decisions (of in total 90 cases) that mention that the senior management of the bank has been replaced. And as set out in section 11.5, the fact that the restructuring plan provides for an improvement of the bank's risk management is welcomed by the Commission and is thus a relevant characteristic. Nonetheless, there are 50 decisions (of in total 90 cases) that do not mention risk management issues.

How to interpret this finding? As set out in the present chapter, there are several interpretations. In the *first* place, the omission to mention the relevant characteristic in several decisions can mean that the Commission did not take into account the relevant characteristics in these cases. This would be clearly inconsistent.

220. Parex banka, C26/2009, 29 July 2009, para. 63.
221. Parex banka, C26/2009, 29 July 2009, para. 64.

In the *second* place, the omission to mention the relevant characteristic in several decisions can mean that the relevant characteristic is not present in these cases. This can be elucidated by the following matrix (which was introduced in section 11.2.2.2 of this chapter).

		Is the relevant characteristic present?	
		Present	Not present
Does the decision mention whether the relevant characteristic is present?	mentioned	The decision mentions that the relevant characteristic is present. *Present/Mentioned* *"situation P/M"*	The decision mentions that the relevant characteristic is absent. *Absent/Mentioned* *"situation A/M"*
	Not mentioned	The decision omits to mention that the relevant characteristic is present. *Present/Omitted* *"situation P/O"*	The decision omits to mention that the relevant characteristic is absent. *Absent/Omitted* *"situation A/O"*

The omission to mention the absence of the relevant characteristic corresponds to situation A/O. Can this situation be justified? This question essentially consists of two questions. Firstly, can the *absence* of the relevant characteristic be justified? And secondly, can the *omission to mention* the absence of the relevant characteristic be justified?

With respect to the first question, the present chapter has shown that some relevant characteristics do not have to be present in each and every case. Furthermore, even relevant characteristics that should always be present can be absent if there is a justification. Thus, the absence of a relevant characteristic can be justified.

With respect to the second question, I am of the opinion that the omission to mention the absence of the relevant characteristic can only be justified when it is obvious that the omission means that the relevant characteristic is not present in the case. Whether this is obvious depends on whether one expects the relevant characteristic to be present. In that regard, the distinction between the relevant characteristics that always have to be present (and whose absence has to be justified) and the relevant characteristics that do not have to be present in each and every case, is important. An example of the first type of relevant characteristic is the fact that the bank's senior management has been replaced. A management change is in principle required (in particular by point 37 of the 2013 Banking Communication). If there is no such management change, then one would expect that the decision clarifies why this relevant characteristic is not present in the case (i.e. why a replacement of senior management is not needed in that case).

An example of the second type of relevant characteristic is the fact that the bank has committed to take measures to improve its corporate governance framework. Such measures only have to be taken when the bank experienced corporate governance problems. Consequently, one does not expect corporate governance measures to be present in every case. This could justify that the absence of this relevant characteristic is not mentioned in every decision.

11.13.2 Implications for the Commission

Another key finding of this chapter is that relevant characteristics are sometimes only mentioned in the description-part of the decision. To give an example, the decision on the Belgian bank KBC indicated that KBC had committed to develop a sustainable remuneration policy. To that end, the incentive schemes would be linked to long-term value creation taking account of risk and restricting the potential for 'rewards for failure'. This commitment is clearly a relevant characteristic. As explained in section 11.4, the Commission views favourably remuneration restrictions. One would expect that the commitment of KBC to develop a sustainable remuneration policy would be taken into account by the Commission in its assessment of the restoration of long-term viability. However, there is no mention of this commitment in the assessment-part of the decision. This commitment is only mentioned in two places in the decision: in the description-part and in the annex containing a list of behavioural commitments.

In my opinion, it would be better if the relevant characteristics are mentioned in the assessment-part of the decision. Admittedly, mentioning the relevant characteristics in the description-part of the decision does not exclude the possibility that they have been taken into account by the Commission in its assessment of the compatibility of the State aid. Nevertheless, mentioning the relevant characteristics in the assessment-part of the decision makes it explicit that they have been taken into account in the compatibility-assessment.

11.13.3 Implications for the Member States and beneficiary banks

How can a Member State in a future bank State aid case convince the Commission that the beneficiary bank will return to long-term viability?

Point 11 of the Restructuring Communication stipulates that the restructuring plan should provide information on – amongst other – the business model of the beneficiary bank, its organisational structure, funding, corporate governance, risk management and the remuneration incentive structure. These elements corresponds to the relevant characteristics discussed in the present chapter. The analysis of the decisional practice reveals that these elements are taken into account by the Commission. Indeed, the present chapter has shown that the Commission notes positively the fact that the corporate governance framework, risk management, remuneration policy, funding and operational efficiency of the bank will be improved.

The implications for the Member States and beneficiary banks are thus relatively straightforward. They should either stress that the restructuring plan includes measures to improve the corporate governance, risk management, remuneration policy, funding and operational efficiency, or stress that the bank did not experience problems on these aspects.

Chapter 12. Burden-sharing

12.1 Introduction

The Commission's assessment of the restructuring plan is based on three pillars. This chapter focuses on the second pillar. The second pillar of the Restructuring Communication requires that the restructuring costs and the amount of State aid are limited to the minimum necessary, and that there is a sufficient own contribution by the beneficiary bank. This own contribution is also referred to as 'burden-sharing': the State (and ultimately the taxpayers) should not bear the burden alone. Instead, the State on the one hand and the beneficiary bank (and its shareholders) on the other hand should each shoulder an appropriate share of the burden.[1]

12.1.1 Why an own contribution?

The own contribution-requirement serves three objectives. The first objective of the own contribution is to address *moral hazard*. A disadvantage of granting State aid is that the beneficiary banks do not have to bear the negative consequences of their actions. If banks know that they will be rescued by the State when they experience serious financial difficulties, then they may be inclined to take more risk (than they would have taken if they could not count on State aid). So the prospect of State aid might lead to moral hazard. To address this problem of moral hazard, the Restructuring Communication requires that the beneficiary bank should provide an appropriate own contribution to the restructuring costs.[2]

1. The phrase "must each shoulder an appropriate share of the burden" was used by the Commission in one of its decisions (Commerzbank, N244/2009, 7 May 2009, para. 104).
2. Point 22 of the Restructuring Communication. As the Commission explained in HRE, 18 July 2011, para. 114, it follows from point 22 that the objective of burden-sharing is twofold: to limit distortions of competition and to address moral hazard. The 2014 R&R-guidelines explicitly indicate that "the notion of burden-sharing has been introduced, inter alia, to better address the issue of moral hazard" (point 11). In the Crisis Communications, limiting moral hazard is mentioned as an objective of the burden-sharing requirement. By contrast, Gilliams (2016, p. 24) argues that while limiting moral hazard is a *desirable outcome* of the burden-sharing requirement, it should not be an *objective* of the burden-sharing requirement.

An own contribution is "necessary to ensure that rescued banks bear adequate responsibility for the consequence of their past behaviour and to create appropriate incentives for their future behaviour".[3]

The second objective of the own contribution is that it ensures that restructuring aid is *limited to the minimum* necessary.[4] Full burden-sharing by shareholders and subordinated debt holders contributes to ensuring that the aid is kept to the minimum.[5] In other words: requiring shareholders and other investors to bear part of the burden ensures that the burden for the State (and thus ultimately the taxpayer) is minimised.

Although it is not mentioned in the Restructuring Communication, a third objective of the own contribution can be found in the 2004 R&R-guidelines. Point 7 of these guidelines indicates that the own contribution demonstrates that "the markets (owners, creditors) believe in the feasibility of the return to viability within a reasonable time period".

12.1.2 Overlap and interaction

There is some overlap between the second pillar (burden-sharing) and the third pillar (limiting competition distortions) of the Restructuring Communication. This is illustrated nicely by the following recital:

> "The Restructuring Communication requires that the restructuring plan proposes measures limiting distortions of competition and ensuring a competitive banking sector. *In that context*, the plan should *also address moral hazard issues* and ensure that State aid is *not used to fund anti-competitive behaviour*".[6] [Italics mine, *REvL*]

The notion *that State aid may not be used to fund anti-competitive behaviour* is mentioned in point 23 of the Restructuring Communication. Point 23 elaborates the own contribution-requirement and explains that restructuring aid should be limited to covering costs which are necessary for the restoration of viability. This

3. Point 22 of the Restructuring Communication. This consideration is reprised in several decisions. See, for instance: Dexia, C9/2009, 26 February 2010, para. 199.
4. In that regard, the burden-sharing requirement has been called a "corollary" of the principle of the limitation of the aid to the minimum. See, inter alia: Kommunalkredit Austria (KA), SA.32745, 31 March 2011, para. 84; ATE, N429/2010, 23 May 2011, para. 79.
5. SA.33757, 9 December 2011, para. 66.
6. Banco CAM, SA.34255, 30 May 2012, para. 160. The same recital can be found in other decisions, such as: Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 228; Lloyds Banking Group (LBG), N428/2009, 18 November 2009, para. 175.

means that State aid may only be used for the rescue and restructuring of the bank; it may not be used to finance anti-competitive behaviour. The exact same notion can be found in a different place in the Restructuring Communication: points 39-45 indicate that State aid may not be used to the detriment of non-aided competitors. These points therefore introduce measures to limit competition distortions. One of these measure is the acquisition ban. This compensatory measure as well as the overlap between points 23 and 39-45 will be discussed in-depth in section 13.10.

In the same vein, *moral hazard* is not only an important issue in the context of burden-sharing; it also appears in the context of limiting competition distortions. The issue of moral hazard is mentioned in the section on the own contribution (see point 22 of the Restructuring Communication) and in the section on the competition distortions (see point 29). Of great importance is the fact that a low degree of burden-sharing can be compensated by a high degree of restructuring. This follows from points 25 (in the context of the own contribution) and 31 (in the context of competition distortions). This means that there is not only an *overlap*, but there is also some *interaction* between burden-sharing and compensatory measures.

12.1.3 Structure of this chapter

The second pillar of the Restructuring Communication provides that (i) both the restructuring costs and the amount of aid should be limited and (ii) a significant own contribution is necessary. It should be noted that (i) and (ii) cannot be completely separated.[7] In fact, they are related: the higher the own contribution of the bank, the smaller the amount of aid needed. Burden-sharing thus contributes to a limitation of the amount of aid.

Which factors – other than burden-sharing – ensure that the aid is limited to the minimum necessary? Section 12.2 provides an answer to this question. It should be noted that the fact *that the bank pays an adequate remuneration to the State* is also relevant in this regard. Indeed, as set out in section 8.6, the remuneration that the beneficiary bank pays to the State constitutes an own contribution by the bank. Thus, the fact that the bank pays an adequate remuneration is not only relevant to the assessment of the proportionality of the State aid measure, it is also relevant to the assessment of the own contribution. The relevance of this relevant characteristic thus transcends the first stage of the compatibility-assessment – this was one of the conclusions of chapter 8. Notwithstanding the relevance of the remuneration to the assessment of the own contribution, it will not be discussed any further in the present chapter, for the simple reason that this relevant characteristic was already extensively discussed in section 8.6.

7. In most cases, (i) and (ii) are addressed in the same section of the decision.

The main part of this chapter is devoted to burden-sharing. Section 12.3 concerns burden-sharing by the bank itself, while sections 12.4 to 12.8 concern burden-sharing by those who invested in the bank. How can burden-sharing be achieved? And how has the Commission assessed whether there was sufficient burden-sharing in the bank State aid cases and which characteristics were relevant to that assessment? These are the questions that will be addressed in this chapter.

12.2 Comparison with alternatives

* *The fact that the chosen rescue/restructuring is the least costly alternative.*

12.2.1 Why is this a relevant characteristic?

As set out in section 6.8, this PhD-study distinguishes between several contexts. The C-context means that the beneficiary bank continues as a standalone entity. The T-context means that the bank is taken over by another bank. The W-context means that the bank will be wound down. The S/T/W-context means that the bank is split-up into a bad bank (to be wound-down) and a good bank (to be sold). The S/C/W-context means that the bank is split-up into a bad bank (to be wound down) and a good bank (that continues to exist as a standalone entity).

These different contexts illustrate that the rescue and restructuring of banks can take place in many ways. There is no standard way of rescuing a failing bank. If the bank is likely to become viable again, then the bank will be restructured in such a way that it can continue as a standalone entity. If, on the contrary, there are no prospects that the bank can return to viability, one of the other scenarios will be chosen: either a sale to another bank, a break-up of the bank or a complete wind-down.

So there are alternative scenarios. Whichever scenario is chosen, *it should be the least costly alternative*. This follows from point 23 of the Restructuring Communication which stipulates that any restructuring or liquidation aid should be limited to the minimum necessary. To this end, Member States should analyse and compare different scenarios when rescuing and restructuring a failing bank. Furthermore, Member States should demonstrate that the alternative that they have chosen is the least costly one. This also follows from point 9 of the Restructuring Communication which stipulates that the restructuring plan should include a comparison with alternative options.

12.2.2 Has the Commission consistently taken into account this relevant characteristic?

The fact that the chosen restructuring is the least costly alternative is a relevant characteristic that should be present in every case. Consequently, the Commission should assess in every bank State aid case whether this relevant characteristic is present. Surprisingly, not every decision mentions this relevant characteristic. In fact, there are only a few decisions that explicitly mention that the chosen scenario is the least costly one.

12.2.3 How is this relevant characteristic elaborated in the decisions?

The way in which this relevant characteristic is elaborated differs among the decisions. In that regard, it should be kept in mind that the scenario analysis is performed by the Member State and only reviewed by the Commission. The restructuring plans are therefore much more detailed than the decisions. In the decisions, the details of the scenario analysis are only mentioned to the extent that they are relevant in that particular case.

In addition, it is useful to point out that the comparison with alternatives can appear at different places in the Commission decisions: in the description of the restructuring plan and in the assessment of the second pillar (burden-sharing).

To give an example: many Spanish banks were taken-over by other banks in Spain. In that regard, the Commission noted that the Spanish authorities had worked out liquidation and resolution scenarios built on different assumptions.[8] The scenarios and underlying assumptions were described in the description-part of the decisions. In the assessment-part, the Commission concluded that since the costs in the orderly winding-down scenario would be higher, the amount of aid could be deemed limited to the minimum necessary.[9]

12.2.4 Concluding remarks

In some decisions, the Commission explicitly welcomed the fact that the Member State has performed a scenario analysis and that the chosen scenario is the least costly one; while in many other decisions, this relevant characteristic is not mentioned. In my opinion, this is inconsistent. However, it should be pointed out that it is in the Member State's own interest that the chosen alternative is the least costly one. Thus, even though some decisions do not explicitly indicate whether the chosen alternative is the least costly one, it is nonetheless likely that the relevant characteristic is present in those cases (i.e. that the chosen alternative is the least costly one).

8. Banco de Valencia, SA.34053, 28 November 2012, para. 180.
9. Banco de Valencia, SA.34053, 28 November 2012, para. 185.

12.3 Own contribution of the beneficiary bank: sale of assets

** The fact that the beneficiary bank is divesting (profitable non-core) subsidiaries.*

12.3.1 Why is this a relevant characteristic?

In section 11.8, it was explained that many beneficiary banks divested non-core activities. Divestments are not only relevant for the return to viability, they are also relevant for another reason: they constitute an own contribution of the beneficiary bank. Pursuant to point 24 of the Restructuring Communication, the bank should use its own resources to finance restructuring.[10] This can be achieved selling assets. Many decisions contain the standard consideration that "the divestments of profitable non-core subsidiaries will generate proceeds, which can be used to finance the restructuring costs".[11] The fact that the beneficiary bank is divesting subsidiaries is thus a relevant characteristic.[12]

12.3.2 Has the Commission consistently taken into account this relevant characteristic?

The standard consideration that the beneficiary bank is divesting profitable non-core subsidiaries is only found in decisions in the C-context. The term "divestment of subsidiaries" is not used in the other contexts. Nevertheless, banks in the other contexts are using own resources to finance the restructuring. Indeed, in the S/T/W-context, the beneficiary bank is split into a bad bank (to be wound-down) and a good bank (to be sold). The sale of the beneficiary bank's sound parts (i.e. the good bank) constitutes an own contribution of the beneficiary bank to its restructuring. Several decisions in the S/T/W-context explicitly refer to point 24 of the Restructuring Communication (which requires the bank to use its own resources to finance restructuring).[13] By the

10. Unlike the R&R-guidelines, the Crisis Communications do not require an own contribution of 50%. See also: WestLB, C43/2008, 12 May 2009, para. 78-79.
11. OVAG, SA.31883, 19 September 2012, para. 113; NordLB, SA.34381, 25 July 2012, para. 152; Sparkasse KolnBonn, C32/2009, 29 September 2010, para. 89; Monte dei Paschi di Siena (MPS), SA.36175, 27 November 2013, para. 144; CatalunyaBanc, SA.33735, 28 November 2012, para. 174.
12. In the decision on Commerzbank, the Commission explained that the sale of assets would lead to a reduction of the bank's RWA and to an increase of the bank's own funds (in case the assets are sold at a price exceeding their book value). Both these effects improve the capital ratios. See: Commerzbank, N244/2009, 7 May 2009, para. 106.
13. Amagerbanken, SA.33485, 25 January 2012, para. 127; Fionia Bank, N560/2009, 25 January 2010, para. 103-104.

same token, in the T-context and W-context, all of the beneficiary bank's assets – thus not only the non-core activities – are sold or wound-down. This also constitutes an own contribution of the bank.[14]

To sum up, the very specific fact that the bank is divesting subsidiaries is only found in decisions in the C-context, while the more general observation that the bank is using own resources to finance the restructuring can be found in almost any decision. An overview of these decisions is provided in the table in Annex XII.

Remarkably, the decision on the Austrian bank BAWAG does not mention whether the bank is divesting activities in order to comply with point 24 of the Restructuring Communication (which requires the bank to use its own resources to finance restructuring). Even more remarkable is the observation that the decision indicates that "as part of the measures to limit distortions of competition, BAWAG will divest its 10% holding in the Hungarian MKB BANK".[15] The decision further indicates that MKB BANK is a profit-making bank. In my opinion, the divestment of its holding in MKB BANK is not only a compensatory measure; it would also qualify as an own contribution of BAWAG. Hence, the divestment should have been mentioned in the decision as an own contribution by the beneficiary bank. The omission to mention this divestments as an own contribution constitutes an inconsistency (since in almost every other decision, the Commission explicitly welcomes divestments as an own contribution). Nevertheless, since the Commission concluded that the restructuring plan included a sufficient own contribution, this inconsistency did not lead to an unfair treatment of BAWAG.

12.3.3 How is this relevant characteristic elaborated in the decisions?

In some decisions, it is clearly mentioned which entities are divested[16], whereas in some other decisions, the entities to be divested are only referred to as "profitable non-core subsidiaries". Another observation is that the decisions

14. This can be illustrated by the following recital: "In the present case, Dexia Group's own contribution to its restructuring is maximised in that all its assets are earmarked for sale or run-off management, and profits from the sales will all go into Dexia's orderly resolution." See: Dexia, SA.33760, 28 November 2012, para. 616.
15. BAWAG, N261/2010, 30 June 2010, para. 104.
16. For instance, the decision on OVAG (SA.31883, 19 September 2012, para. 113) indicates that "the restructuring costs are financed by proceeds from the divestments of stakes in profitable non-core entities (RZB, retail subsidiaries in Austria (already implemented in 2009-2010), VBLI)". Another example is Dexia, C9/2009, 26 February 2010, para. 206. The restructuring plan of LBBW also envisaged the sale of units which were important for its business model; in other words: core activities. This made the Commission conclude that LBBW was making an important contribution to the restructuring costs. See: LBBW, 15 December 2009, para. 96.

usually do not explain why these entities were chosen to be divested. In essence, the only important feature of these divestments is that they generate proceeds – there is thus no need to discuss other features.

In most decisions, the fact that the bank has made divestments is thus not very elaborated. The decisions only dwell on this relevant characteristic if the possibilities for burden-sharing are limited (see subsection 12.3.3.1), or if the divestment is not accepted as an own contribution (see subsection 12.3.3.2).

12.3.3.1 Limited possibilities for burden-sharing

Sometimes, the possibilities for burden-sharing are limited. This can be the case if there are just no subsidiaries to divest, or if divesting those subsidiaries would endanger the bank's viability. An example of the first situation can be found in the case of the (Cypriot) Cooperative Central Bank (CCB):

> "Since the CCIs *do not engage in international businesses* and do not carry out sizable non-banking activities, there was no option for more divestments outside core Cypriot banking operations".[17]

Other examples of a limited possibility to downsize are the cases of ATE, T Bank and Commerzbank. In the decision on T Bank, the Commission noted that T Bank was a very small bank: "It owned no stand-alone subsidiaries or business of sufficient size to be sold separately to contribute to the cost of the restructuring".[18] Similarly, in the decision on the Greek bank ATE, the Commission considered that "in view of the fact that ATE is mainly a retail bank that has no large bond portfolios to reduce but a medium-sized balance sheet consisting mainly of loans, the present downsizing is significant".[19] In the decision on Commerzbank, the Commission noted that "Commerzbank is not in a position to sell off further assets to reinforce its capital base in the short term without jeopardising its survival in the long term".[20]

12.3.3.2 Divestments that are not accepted as an own contribution measure

There are some cases in which the divestments were not accepted as an own contribution.[21] One of these cases is the case of Nova Ljubljanska banka (NLB). In the Opening Decision in the case of NLB, the Commission expressed its doubts as to the own contribution by NLB. NLB planned to divest several

17. CCB, SA.35334, 24 February 2014, para. 149.
18. T Bank, SA.34115, 16 May 2012, para. 52.
19. ATE, N429/2010, 23 May 2011, para. 86.
20. Commerzbank, N244/2009, 7 May 2009, para. 106.
21. See also: IKB, C10/2008, 21 October 2008, para. 105.

subsidiaries. However, most of these subsidiaries were not profitable. The Commission considered that the divestment of non-profitable activities did not qualify as own contribution. According to the Commission, the divestment of these subsidiaries was rather a step necessary to ensure the return to viability.[22]

Thus, divestments can only be considered as an own contribution *when they generate proceeds*. This was not the case with the impaired assets that Hypo Real Estate (HRE) had transferred to FMS-WertManagement. The Commission noted that the transfer effectively cut the balance sheet of HRE in half. Nevertheless, the Commission concluded that the transfer could not be considered as an own contribution, since the price that HRE received, exceeded the real economic value (REV) of the assets. The Commission explicitly held that the transfer had not created "any accounting surplus that could have contributed to the financing of the restructuring costs".[23]

12.3.3.3 Intermezzo: the different purposes of divestments

The previous subsection illustrated that divestments do not always serve the same purpose. In that regard, it should be recalled that there are three restructuring objectives: i) restoration of long-term viability, ii) burden-sharing/own contribution, and iii) minimising competition distortions. Sometimes, a divestment is aimed specifically at one of the three objectives; and sometimes, a divestment serves several purposes.

The case of Ethias is a prime example of the first situation. Ethias committed to three divestments: i) Ethias Banque, ii) BelRe, and iii) Nateus. With respect to Ethias Banque, the Commission noted firstly that Ethias Banque was historically loss-making, and secondly that the divestment was consistent with the aim of refocussing on Ethias insurance activities.[24] This divestment purely served the objective of restoring the viability of Ethias. With respect to BelRe, the Commission noted that, since the estimated market price of BelRe was significantly above its book value, the sale should free additional capital, which could be used to cover restructuring costs.[25] With respect to Nateus, this divestment was aimed at increasing competition. The Commission noted that it was a divestment in the core market of Ethias, where the size of Nateus in terms of market share was sufficient to give a new competitor an opportunity to enter the market.[26] So in the decision on Ethias, a sharp distinction was made between the divestments in terms of purpose.

22. Nova Ljubljanska banka (NLB), 2 July 2012, para. 100.
23. Hypo Real Estate (HRE), C15/2009, 18 July 2011, para. 118.
24. Ethias, N256/2009, 20 May 2010, para. 122.
25. Ethias, N256/2009, 20 May 2010, para. 132.
26. Ethias, N256/2009, 20 May 2010, para. 139-140.

By contrast, it is also possible that the same divestment serves three objectives. This can be illustrated by the case of Banco Mare Nostrum (BMN). In the context of the viability-assessment, the decision mentions that BMN would divest the large majority of its equity stakes and subsidiaries.[27] In the context of the burden-sharing assessment, the decision mentions that "the restructuring costs are also partly borne by the future proceeds from the divestments of subsidiaries and equity stakes in non-core entities, as set out in the Term Sheet and recalled below in recital (155)".[28] Recital 155 discusses the balance sheet reduction and can be found in the context of the assessment of the compensatory measures.

There are also bank State aid cases in which it is not clear whether the divestments serve the same purpose or several purposes. In these cases, the decisions do not clarify whether the divestments that are needed for viability-purposes are the same divestments that are needed for burden-sharing purposes or that are needed as compensatory measure.

The way in which the divestments are elaborated in the decisions depends to some extent on the purpose of the divestment. Divestments that are needed for viability-purposes have a certain rationale: these divestments concern non-core activities or loss-making activities. Divestments that are meant as an own contribution are not really elaborated in the decisions. In essence, the only important feature of these divestments is that they generate proceeds. So there is no need to discuss other features. By contrast, divestments that are meant as a compensatory measures are discussed in more detail. As will be explained in section 13.5, this is especially true for divestments that are aimed at creating a new competitor.

12.3.4 Concluding remarks

The divestment of profitable subsidiaries – or more general: the sale of assets – by the beneficiary bank is a relevant characteristic, because it constitutes an own contribution of the bank. Indeed, such divestments generate proceeds which can be used to finance the restructuring costs. This section has shown that there are some cases in which the Commission did not accept the divestments as an own contribution (see subsection 12.3.3.2). This illustrates that the Commission explicitly assesses the presence of this relevant characteristic.

27. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 136.
28. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 149.

12.4 Burden-sharing by those who invested in the bank

12.4.1 "Those who invested in the bank"

The principle of burden-sharing requires that the restructuring costs should not only be borne by the State but also *by those who invested in the bank*. Who are the persons or entities that have invested in the bank? Essentially, there are three categories: i) shareholders of the bank, ii) hybrid capital holders and subordinated debt holders; and iii) senior creditors.

While there are many different types of securities (such as preference shares and CoCo's), the Commission does not really make a distinction between hybrid capital and subordinated debt. Instead, they are usually bracketed together.[29] For instance, the decision on Alpha Bank speaks of "subordinated and hybrid debt"[30], the decision on Banco Mare Nostrum speaks of "hybrid and subordinated debt"[31] and the decision on NLB speaks of "hybrid capital holders and subordinated debt holders".[32] Burden-sharing by these investors is usually achieved in the same way, so it makes sense to treat them as one category.

Admittedly, the CRR sets out a detailed distinction between Common Equity Tier 1, Additional Tier 1 and Tier 2 Capital. From a regulatory perspective, it is important to clearly distinguish between these different types of capital. By contrast, from a State aid control perspective, such a distinction is less important, because burden-sharing is required by all of these investors.

However, since burden-sharing by shareholders is achieved in a different way than burden-sharing by hybrid and subordinated debt holders, it is useful to make a distinction between these two. Burden-sharing by shareholders will be discussed in section 12.5, while burden-sharing by subordinated debt holders will be discussed in section 12.6.

Burden-sharing by senior creditors is not required under State aid rules – but it sometimes takes place. This will be discussed in section 12.7.

12.4.2 From bail-out to bail-in

Before discussing the different forms of burden-sharing, it is useful to point out that there is a transition from "bail-out" to "bail-in". As explained in chapter 4 of this PhD-study, the BRRD introduced the bail-in tool, according to which shareholders and (unsecured[33]) creditors have to fully contribute to the bank's

29. Dübel (2013a, p. VI) also remarked that hybrid capital and subordinated debt are often lumped in one category.
30. Alpha Bank, SA.34823, 9 July 2014, para. 115.
31. Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 150.
32. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 150.
33. Recital 70 of the BRRD stipulates that it is not appropriate to apply the bail-in tool to claims in so far as they are secured, collateralised or otherwise guaranteed.

resolution. One of the general principles governing resolution is that creditors of the bank under resolution have to bear losses after the shareholders (in accordance with the order of priority of their claims under normal insolvency proceedings).[34] All creditors have to bear losses, unless they are excluded from the scope of the bail-in tool by Art. 44(2) or (3) BRRD.

One of the developments in the run-up to the BRRD that is worth mentioning is the Financial Sector Adjustment Programme for Spain. The Memorandum of Understanding on Financial Sector Policy Conditionality (MoU) of 20 July 2012 included several principles regarding burden-sharing.[35] Pursuant to point 17 of the MoU, the Spanish authorities would require burden-sharing measures from hybrid capital holders and subordinated debt holders. To this end, subordinated liability exercises (SLE's) would be implemented. Point 18 of the MoU provided that the Spanish authorities would adopt the necessary legislation to allow for mandatory SLE's if the required burden-sharing was not achieved on a voluntary basis. This legislation consisted of *Real Decreto-ley 24/2012 de 31 agosto* ('Royal Decree Law 24/2012') and the subsequent *Ley 9/2012 de 14 noviembre*. This legislation has been referred to as "the Spanish bail-in tool".[36] To some extent, this legislation was in line with the proposal for the BRRD ("*en linea con la propuesta de directiva*").[37] This illustrates that already before its adoption, the BRRD had an impact on the burden-sharing required by Member States.[38]

The proposal for the BRRD had an impact on the Commission State aid control: to some extent, the 2013 Banking Communication anticipated on the BRRD. The 2013 Banking Communication explicitly requires a maximum contribution from shareholders, hybrid capital holders and subordinated debt holders. However, unlike the BRRD, the 2013 Banking Communication does not require a contribution from senior debt holders.[39]

34. Art. 34(1)(b) BRRD.
35. Many decisions referred to this MoU. See, for instance, Banco de Valencia, SA.34053, 28 November 2012, para. 72: "In accordance with the MoU and Royal Decree Law 24/2012, prior to benefiting from State aid, aided banks must conduct burden-sharing exercises on existing shareholders, and on holders of preference shares and subordinated (both perpetual and dated) debt instruments so as to, inter alia, maximise the loss-absorption capacity of the aided bank."
36. Linklaters 12 September 2012.
37. However, unlike the BRRD, the Royal Decree Law 24/2012 did not require a contribution from senior debt holders.
38. When Spain implemented the BRRD, Ley 9/2012 was repealed.
39. Point 42 of the 2013 Banking Communication.

The 2013 Banking Communication thus introduced clear requirements for burden-sharing. Previously, point 24 of the Restructuring Communication indicated that it was "not appropriate *to fix thresholds concerning burden-sharing ex ante* in the context of the current systemic crisis". The absence of ex ante thresholds resulted in "diverging approaches to burden-sharing across Member States", as the Commission observed in the 2013 Banking Communication. This, in turn, resulted in divergent funding costs for banks and would risk undermining the level playing field. For that reason, the Commission decided to raise the minimum requirements for burden-sharing.

Broadly speaking, the Commission's approach toward burden-sharing is characterised by an increasing strictness. In that regard, it is worth stressing that an evolving policy does not mean that the principle of equal treatment is violated. As explained in section 6.7.3, I am of the opinion that the principle of equal treatment allows for policy changes.

12.5 Burden-sharing by shareholders

* *The fact that the beneficiary bank is nationalised.*

* *The fact that the bank's shareholders are diluted.*

* *The fact that the bank's shareholders participate in a capital raising exercise.*

* *The fact that the bank's shareholders remain at the bad bank or the bank in liquidation.*

* *The fact that the bank's equity is completely written-down.*

* *The fact that the beneficiary bank is subject to a dividend ban.*

12.5.1 Why are these characteristics relevant?

The above-mentioned relevant characteristics constitute the various ways in which burden-sharing by shareholders can be achieved. As will be explained in the following subsections, a bank can be nationalised; the bank's shareholders can be diluted; they can contribute to a capital raising exercise; they can be left in the 'bad bank' or bank in liquidation (in case of a split-up of the bank); or they can be completely written-down. In addition, burden-sharing can be enhanced by a dividend ban.

The fact that there are different types of burden-sharing by shareholders raises the question which type of burden-sharing by shareholders is most common. The answer to this question is provided by the table in Annex VIII, which gives an overview of the burden-sharing by shareholders in the bank State aid cases.

12.5.2 Has the Commission consistently taken into account these relevant characteristics?

In principle, burden-sharing by shareholders is always required. This means that one of the forms of burden-sharing should be present. In other words: the shareholders should either be expropriated in the context of a nationalisation, be written-down, be diluted, participate in a capital raise or remain at the bank in liquidation. Since burden-sharing by shareholders is in principle always required, the Commission should always assess whether one of these types of burden-sharing is present.

It is worth stressing that the Commission should not only assess whether there is burden-sharing; it should also assess whether the burden-sharing is sufficient. The assessment whether there is sufficient burden-sharing depends on the exact modalities of the burden-sharing. For instance, the fact that the shareholders of a nationalised bank receive a compensation makes the burden-sharing less burdensome (than a nationalisation without any compensation).

In addition, there are various types of burden-sharing which can to a certain extent be considered as alternatives. This raises the following question: are these types of burden-sharing equivalent to each other? In other words: are they equally burdensome? The answer to this question depends on the exact modalities of the burden-sharing. Given the importance of the precise modalities of the burden-sharing, the various types of burden-sharing are discussed in-depth in the following subsection.

12.5.3 How are these relevant characteristics elaborated in the decisions?

12.5.3.1 Nationalisation

One of the most extreme types of burden-sharing by shareholders is the nationalisation of the bank. The nationalisation of an ailing bank excludes the shareholders from receiving the benefit of any State aid.[40] As a result, moral hazard is minimised, because the shareholders bear the consequences of the bank's failure. In one of its decisions, the Commission literately indicated that in the cases of Northern Rock and Hypo Real Estate, burden-sharing was achieved by nationalisation.[41]

40. Bradford & Bingley, N194/2009, 25 January 2010, para. 55.
41. WestLB, C40/2009, 20 December 2011, para. 186.

How can a bank be nationalised? It can be achieved by a *transfer* of the shares to the State or by a *write-down* of the shares. An example of the former is the case of Hypo Group Alpe Adria (HGAA). In this case, the shareholders of HGAA sold their shares to the Austrian State for the symbolic price of one euro.[42] This nationalisation was based on the Austrian law for remedying a serious disturbance in Austria's economy (FinStaG) and it followed intense negotiations between HGAA's shareholders and the Austrian State.[43]

In the case of Nova Kreditna Banka Maribor (NKBM), the State recapitalisation was combined with the requirement that NKBM *would write-down in full its shareholders' equity* (and outstanding subordinated debt). To that end, the Bank of Slovenia adopted on 18 December 2013 a decision on extraordinary measures.[44] Pursuant to this decision, NKBM was required to write down all of its qualified liabilities.[45] NKBM's shares (totalling EUR 143.225.000) were cancelled; this was reflected in an increase in the share premium by the same amount.[46] As a result, NKBM's share capital was reduced to zero. But on the same day as the write-off, the Slovenian State subscribed to 10.000.000 newly issued shares of NKBM, thereby increasing the Bank's share capital by EUR 150.000.000.[47] Thus, after this recapitalisation, the Slovenian State became the sole shareholder of NKBM.

Nationalisation can also be achieved by diluting the shareholders. This can be illustrated by the case of Hypo Real Estate (HRE) which was taken into public ownership in 2009. This nationalisation was the result of several capital injections (which diluted the shareholders)[48] and a squeeze-out[49] of minority shareholders. Dilution will be discussed further in subsection 12.5.3.2.

The fact that a bank is nationalised is highly relevant. However, this fact, in itself, does not convey sufficient information regarding burden-sharing by shareholders. An essential question in that regard is *whether the shareholders have received a compensation*. The amount of compensation determines how burdensome the nationalisation is to shareholders.

42. Hypo Group Alpe Adria (HGAA), SA.32554, 3 September 2013, para. 35.
43. Hypo Group Alpe Adria (HGAA), N698/2009, 23 December 2009, para. 28.
44. Based on the Slovenian Banking Act.
45. The summary of the Decision on extraordinary measures imposed on NKBM is reproduced in the 2013 annual report of NKBM (page 29).
46. 2013 Annual report, page 228. In addition, NKBM's subordinated financial instruments (totalling EUR 89.540.000) were written off; this lead to an increase of the NKBM's income by the same amount.
47. 2013 Annual report, page 228.
48. On 30 March 2009, a capital injection of EUR 60 million took place; SoFFin bought 20 million new HRE shares at their nominal value of EUR 3 per share. In June 2009, another capital injection took place (amounting to EUR 2,96 billion). As a result of these capital injections, SoFFin reached a capital participation of 90%.
49. A squeeze-out means that the minority shareholders are obliged to sell their shares to the majority shareholder.

In some cases, there is a compensation for the shareholders of the nationalised bank. For instance, in the case of Northern Rock, the shareholders received a compensation. However, this compensation was based on a valuation of the shares on the assumption that no State aid would be granted. Consequently, the compensation was likely to be close to zero.[50]

In most[51] decisions on nationalised banks, the Commission welcomed the fact that the beneficiary bank's shareholders had lost control of the bank and all the financial stakes therein *without any compensation*.

12.5.3.2 Dilution

Dilution means that the ownership percentage of the current shareholders is reduced as a result of an issue of additional shares to which the current shareholders have not subscribed. Dilution can result in a loss of control by the current shareholders. Dilution is thus a form of burden-sharing by the shareholders of a beneficiary bank.

An illustration of dilution

Dilution can be illustrated by one of the bank State aid cases. For instance, the Restructuring Decision on the Irish bank PTSB indicates that the shareholders of PTSB had been heavily diluted, since the Irish State holds 99,2% of PTSB as a result of the capital injection of EUR 2,3 billion.[52]

More detailed information can be found in the 2011 Annual Report. In this Annual Report, it is indicated that the issue price was EUR 0,06345 per share; in total, 36.249.014.972 ordinary shares were placed.[53] The number of issued shares multiplied by the issue price corresponds to the amount of the capital injection (36.249.014.972*0,06345 = 2,3 billion). Since the issue price (of EUR 0,06345 per share) was higher than the nominal value of each share (EUR 0,031), the capital injection included a share premium of 0,03245 per share. Thus, of the 2,3 billion recapitalisation, EUR 1,123 billion (= 36.249.014.972 * 0,031) was recorded in share capital and EUR 1,131 billion was recorded in share premium after costs (which amounted to EUR 46 million).

Originally, there were 276.782.351 ordinary shares. Following the capital injection, there were 36.525.797.323 ordinary shares, of which the Irish State held 36.249.014.972 ordinary shares. This corresponds to 99,2% of the share capital.[54]

50. Northern Rock, C14/2008, 28 October 2009, para. 149.
51. There are a few exceptions. For instance, in the case of KA, the shareholders received participation certificates (which could be considered as a form of compensation). A full overview is provided in the table in Annex VIII.
52. IL&P, SA.33442, 9 April 2015, para. 85.
53. See Annual Report 2011, page 157.
54. 36.249.014.972/36.525.797.323 = 0,992422 = 99,2%.

The Commission noted positively that the chosen purchase price per share resulted in a high level of dilution.[55] NB: the level of dilution is related to the height of the issue price. The higher the issue price, the lower the number of shares obtained by the State, and thus the lower the level of dilution.

No dilution

It has to be pointed out that dilution of shareholders can only occur if the State aid is granted *through a recapitalisation in the form of shares*. Obviously, if the State aid only consists of a guarantee or an impaired asset measure, then there is obviously no question of dilution. But also if the State aid consists of hybrid securities, then there is no dilution. Issuing hybrid securities does not affect the share capital. Only if common shares are issued, dilution can occur. For instance, in 2009, OVAG benefited from a EUR 1 billion recapitalisation: the Austrian State subscribed to participation certificates (Partizipationsscheine).[56] These participation certificates are treated as Tier-1 capital[57], but they do not constitute shares. Consequently, the existing shareholders of OVAG were not diluted by the 2009 recapitalisation.[58]

Dilution related to a future capital increase

In some cases, dilution was related to a future capital increase. This can be illustrated by the case of ING. This bank was recapitalised in the form of Core Tier 1 securities. Since these securities were not ordinary shares, the existing shareholders of ING were not diluted by the recapitalisation. However, the restructuring plan contained a capital raising exercise: ING would have to raise EUR 5 billion via a share offering. This capital increase would result in a dilution of the existing shareholders.[59]

The same reasoning can be found in the decision on the viability plan of SNS REAAL. In 2008, SNS REAAL was recapitalised in the form of Core Tier 1 securities. In September 2009, SNS REAAL raised EUR 135 million in new capital. This capital increase was used to partially repay the State aid. In the 2010 Restructuring Decision on SNS REAAL, the Commission considered that the shareholders were sufficiently diluted by the EUR 135 million capital increase (equivalent to 10% of shares).[60]

55. IL&P (PTSB), SA.33311, 20 July 2011, para. 81.
56. OVAG, SA.31883, 9 December 2011, para. 23.
57. Participation certificates do not carry voting rights, but they do carry a preferential dividend and a conversion option.
58. By contrast, in 2012, a capital increase by EUR 250 million took place, which resulted in a dilution of shareholders. See Decision of 19 September 2012, para. 23.
59. ING, C10/2009, 18 November 2009, para. 136; ING, SA.28855, 11 May 2012, para. 193.
60. SNS REAAL, N371/2009, 28 January 2010, para. 77.

Banca Monte dei Paschi di Siena ("MPS") was recapitalised in the form of 'Monti-bonds' (in the decision referred to as 'new instruments'). These 'new instruments' are hybrid capital instruments. The restructuring plan of MPS included an accelerated repayment schedule with respect to the 'new instruments'. To that end, MPS intended to increase its capital by at least EUR 2,5 billion.[61] This capital increase would significantly dilute the existing shareholders. If the capital increase would not be successful, then the 'new instruments' would be converted into normal shares. This conversion would also result in the dilution of existing shareholders.[62]

The case of the Portuguese bank Banif provides another example of such a conversion mechanism. The recapitalisation of Banif took place in the form of 'special shares' (of which some had full voting rights and some only limited voting rights) and CoCo's. The special shares with limited voting rights and the CoCo's were subject to a *mandatory conversion mechanism*.[63] If EUR 450 million of private capital would not be raised by 30 June 2013 or if the CoCo's were not repaid within the stipulated timeframe, all the outstanding CoCo's would be converted into shares with full voting rights. This would lead to dilution of the existing shareholders.[64]

Level of dilution

Does the level of dilution matter? Before the introduction of the 2013 Banking Communication, the Commission did not set an ex ante threshold for burden-sharing. Nevertheless, in a few cases in the pre-2013 Banking Communication era, the Commission expressed it doubts whether burden-sharing by shareholders was sufficient.

61. Banca Monte dei Paschi di Siena (MPS), SA.36175, 27 November 2013, para. 57.
62. The same mechanism can be found in the case of Cajatres (para. 153): "In case of no repayment, the CoCos will automatically convert into equity and will trigger a new notification to the Commission."
63. Banif, SA.34662, 21 January 2013, para. 38.
64. However, in its Opening Decision on Banif, the Commission observed that this mandatory conversion mechanism was not complied with by Banif. The repayment schedule of the CoCo's was not followed by Banif. This would have to trigger the conversion of the outstanding CoCo's, but Banif did not take steps to convert the CoCo's. The Commission therefore had doubts whether the dilution of the shareholders had reached the full extent envisaged by the Rescue Decision. See: Banif, SA.36123, 24 July 2015, para. 89. Eventually, this Opening Decision was revoked by the decision of 21 December 2015. In December 2015, Banif was put into resolution (in accordance with the BRRD), which led to adequate burden-sharing.

In that regard, the case of HSH Nordbank is a very important case.[65] In this case, the Commission considered that there was insufficient dilution by the minority shareholders. There was a recapitalisation of EUR 3 billion.

- In total, 157.894.737 shares were issued at an issue price of EUR 19 per share. (EUR 3000 million / EUR 19 = 157.894.737 shares)
- The nominal value per share is EUR 10[66], so 157.894.737 shares means an increase of the share capital by around EUR 1579 million. This is exactly the difference between the share capital in 2008 and 2009 (see table).
- The issue price per share is EUR 19, whereas the nominal value is EUR 10. This means that the premium per share is EUR 9. The premium is added to the capital reserve[67], so there is an increase of EUR 1421 million (=157.894.737 * EUR 9). This is exactly the difference between the capital reserve in 2008 and 2009 (see table).
- The recapitalisation of EUR 3 billion thus leads to an increase of the share capital by EUR 1579 million and an increase of the capital reserve by EUR 1421 million. (1579+1421=3000)

Equity	*2009*	*2008*	*Difference*
Share capital	EUR 2460 million	EUR 881 million	EUR 1579 million (=2460-881)
Capital reserve	EUR 1509 million	EUR 88 million	EUR 1421 million (=1509-88)

In 2008, the minority shareholders had a stake of 25,67%. The share capital in 2008 was EUR 881 million. In other words: there stake was (0,2567*881=) EUR 226.152.700. In 2009, their stake of EUR 226.152.700 as compared to the EUR 2460 million share capital was only 9,19% (i.e. 226.152.700 / 2460 million).

It should be recalled that the level of dilution is related to the height of the issue price. The higher the issue price, the lower the number of shares obtained by the State, and thus the lower the level of dilution. For instance, if the issue price would have been EUR 10 (instead of EUR 19), then the share capital would have increased by EUR 3000 million (instead of EUR 1579) and would have been EUR 3881 million (instead of EUR 2460 million). In that case, the shareholdings of the minority shareholders would have been diluted to (226.152.700/3881 million =) 5,83% (instead of 9,19%).

65. Also in the case of WestLB and BayernLB, the Commission had doubts whether burden-sharing was sufficient. Eventually, these doubts had been allayed. Another case is the case of BayernLB. See: WestLB, 22 December 2009, para. 77; WestLB, 20 December 2011, para. 196-199; BayernLB, 12 May 2009, para. 99-102.
66. Annual report 2009 HSH Nordbank, p. 167.
67. Annual report 2009 HSH Nordbank, p. 167.

In its Opening Decision on HSH Nordbank, the Commission considered that the issue price was too high and that consequently, the minority shareholders benefited disproportionately by not being completely diluted.[68] However, in the final decision, the Commission took into account several additional burden-sharing measures. The EUR 500 million lump sum payment in shares would dilute the stakes held by the minority shareholders.[69]

Also in the case of Royal Bank of Scotland (RBS), the Commission was of the opinion that there was insufficient dilution, because the issue price of the B shares was above the share price of RBS. Consequently, the B shares had a less dilutive effect than a standard ordinary share issuance or rights issue. This would go against the concept of burden sharing. However, since the B shares included some hybrid-like features, the Commission concluded that these features compensated for the less dilutive effects.[70]

Of crucial importance is the 2013 Banking Communication which requires *full burden-sharing* by shareholders: point 41 stipulates that losses are first absorbed by equity. This would point at a dilution level of 100%. However, as is illustrated by the decision on the Cooperative Central Bank (CCB), an almost complete dilution – thus not a complete dilution – can under circumstances also be accepted by the Commission. The State aid to CCB was assessed under the 2013 Banking Communication. Cyprus acquired 99% of the shares and voting rights of the CCB. Its existing shareholders, the CCIs, were almost completely diluted and left with 1%.[71] The Commission first considered that the State would normally be entitled to 100% of CCB's shares. However, the July 2013 strategy – agreed between Cyprus and the programme partners within the Framework of the Economic Adjustment Programme for Cyprus – envisaged that the old owners (i.e. the CCIs) would have a minimum level of participation in order to preserve some of the cooperative characteristics.[72] Therefore, the Commission accepted the 1% shareholding of the historical owners.[73]

68. HSH Nordbank, C29/2009, 22 October 2009, para. 72.
69. HSH Nordbank, SA.29338, 20 September 2011, para. 259.
70. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 140.
71. CCB, SA.35334, 24 February 2014, para. 139.
72. CCB, SA.35334, 24 February 2014, para. 35.
73. CCB, SA.35334, 24 February 2014, para. 142. Also in the cases of the four large Greek banks, an almost complete dilution was accepted by the Commission. See: Piraeus Bank, 29 November 2015, para. 128.

12.5.3.3 Capital raising exercise

When shareholders participate in a capital raising exercise, then they are not diluted (or less diluted – depending on the percentage of participation). For instance, in the case of the Lithuanian Central Credit Union (LCCU), there was no mention of dilution, because the member credit unions contributed to the capital increase of LCCU.[74] Participating in a capital raising exercise constitutes burden-sharing by shareholders. In one of its decisions, the Commission noted that "as the shareholders have injected capital into the bank pro rata to their respective shareholding, the burdens are at least equitably distributed among the groups of shareholders".[75]

The fact that shareholders are diluted and the fact that shareholders participate in the capital raising exercise are counterparts: either the shareholders participate in the capital raising exercise by purchasing newly issued share pro rate to their current stake, or they do not participate in the capital raising exercise, resulting in a dilution of their shareholding.[76]

The fact that shareholders participate in the capital raising exercise is relevant as regards burden-sharing, while the fact that the bank conducted a capital raising exercise is also relevant from another perspective: it ensures that the aid amount is limited to the minimum. Indeed, in some decisions, the Commission noted positively that the beneficiary bank had, prior to receiving State aid, conducted a capital raising exercise. For instance, in June 2008, prior to the State support, Royal Bank of Scotland (RBS) conducted a capital raising exercise.[77] In December 2008, RBS conducted another capital raising exercise. The State participated in the capital raising exercise, but it only purchased the shares not subscribed by the market. This was noted positively by the Commission, because it ensured that alternative financing could not be found on the market.[78]

Similarly, in the decision on Banco Comercial Português (BCP), the Commission noted positively that 14% of the capital shortfall was provided by private investors.[79] In 2012, BCP not only issued CoCo's subscribed by the Portuguese State, BCP also issued ordinary shares. These shares were offered to the current shareholders of BCP for subscription through the exercise of their pre-emptive subscription rights.[80] The issuance of ordinary shares diminished the State's recapitalisation to 86% of the identified total capital shortfall.

74. Lithuanian Central Credit Union (LCCU), SA.34208, 26 September 2012, para. 11 and 53.
75. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 97.
76. See the decision on Bank of Ireland, SA.33443, 20 December 2011, para. 160: "Incumbent shareholders had to provide fresh capital to finance the restructuring costs, or significantly diluted in the capital raise."
77. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 211.
78. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 212.
79. Banco Comercial Português (BCP), SA.34724, 30 August 2013, para. 110.
80. Banco Comercial Português (BCP), SA.34724, 30 August 2013, para. 25.

12.5.3.4 Remaining at the bad bank or bank in liquidation

Remaining at the bad bank or bank in liquidation is a form of burden-sharing that only occurs in the S/T/W-context or S/C/W-context. In these contexts, the bank is split-up into a bad bank and a good bank. The good bank is usually transferred to another bank, while the bad bank is wound-down. The S/T/W-context also comprises the situation in which all the good parts of the bank are transferred to a large viable bank, while the remainder is put into liquidation. In these cases, the shareholders (and subordinated debt holders) remain at the bad bank or bank in liquidation. This constitutes burden-sharing, as is nicely explained in the following recital:

> "The shareholders and subordinated debt holders are not transferred and remain in the entity in liquidation. They will be entitled to proceeds from the liquidation only if the proceeds are sufficient to repay first the Resolution Scheme, which has a priority claim over the other creditors. Knowing that there are no more assets in T Bank, it is very likely that the shareholders and subordinated debt holders will not get back their investments".[81]

There is thus burden-sharing by shareholders, hybrid capital holders and subordinated debt holders if they are not taken over by the acquiring bank. Is this form of burden-sharing equivalent to the other forms of burden-sharing? In other words: how burdensome is remaining at the bad bank or bank in liquidation for shareholders?

This depends on the quantity and quality of the residual assets. For instance, in the decision on Panellinia Bank, the Commission considered "that sufficient burden-sharing was achieved since the shareholders are entitled to proceeds from the liquidation only if the proceeds are sufficient to repay first the Resolution Fund, which has a large priority claim over other creditors. Therefore, given the scarcity of the residual assets in the Bank after the purchase and assumption, the shareholders are unlikely to get their investment back".[82]

In addition, several cases were characterised by a so-called 'earn-out mechanism'. Such a case is the case of Amagerbanken (a Danish bank), which was wound-down under the Danish winding-up scheme.[83] All assets and some liabilities of the Danish bank Amagerbanken ("Old Bank") were transferred to "New Bank". This "New Bank" was merely a bridge bank: the good parts of New Bank were taken over by Bank Nordik. All shareholders and subordinated

81. T Bank, SA.34115, 16 May 2012, para. 51.
82. Panellinia Bank, SA.41503, 16 April 2015, para. 84.
83. Other cases are the case of Fionia Bank and of Roskilde Bank.

debtholders of Amagerbanken remained at Old Bank. The conditional transfer agreement contained an earn-out mechanism: if the winding-down of the remainder of the New Bank generated a profit, that profit was to be distributed as follows: First, repayment to the FSC of all aid received, including an annual interest payment of 10%. Second, any remaining proceeds from the liquidation of the remainder of the New Bank were to be distributed among the bankruptcy estate's creditors and subsequently the shareholders.[84] The Commission, however, noted that such a prospect was very unlikely in view of the assessment of the value of the assets transferred to the New Bank.[85]

It can be concluded that the fact that the shareholders remain at the bad bank or bank in liquidation usually *amounts to full burden-sharing*. In that sense, it is equivalent to a nationalisation (without any compensation), a complete dilution or a full write-down.

12.5.3.5 Write-down

As discussed in subsection 12.5.3.1, nationalisation can be achieved by a write-down: the shares are cancelled, while the State simultaneously injects new capital in the bank. There are also a few bank State aid cases in which the shares were cancelled, *but without the State subscribing to newly issued shares*. In the table in annex VIII, these cases are categorised under the heading "write-down", while the bank State aid cases in which the shares were written-down *in the context of a nationalisation* are categorised under the heading "nationalisation".

The case of Kaupthing Bank Luxembourg may serve as an example of a case categorised as a "write-down". Kaupthing Bank Luxembourg was a subsidiary of the Icelandic banking group Kaupthing Bank. This is a case in the S/T/W-context: the bank's activities in Belgium and Luxembourg were taken over by other banks, while all other assets were transferred to a SPV. As regards burden-sharing, the Commission noted the following:

> "The restructuring plan provides that the Bank's shareholder (that is to say the Icelandic parent company) *must reduce its capital in the Bank to zero*, with the result that it ceases to be a shareholder without receiving any compensation. To that degree, the Bank's shareholder will have participated in the costs by absorbing the losses to the maximum extent of its capital".[86] [Italics mine, *REvL*]

84. Amagerbanken, SA.33485, 25 January 2012, para. 57.
85. Amagerbanken, SA.33485, 25 January 2012, para. 125.
86. Kaupthing Bank Luxembourg, N344/2009, 9 July 2009, para. 72.

12.5.3.6 Dividend ban

Interestingly, there are cases in which there is no mention of nationalisation, write-down, dilution, participation in a capital raise or remaining at the bank in liquidation. This was the case in FIB, CIF, KBC, FIH and Liberbank. It would, however, be wrong to assume that this would mean that there is no burden-sharing in these cases: these cases were characterised by a dividend ban. This behavioural restriction entails that the bank will not pay any dividends (during the restructuring period). Although a dividend ban constitutes burden-sharing by shareholders, it is far more limited than the other forms of burden-sharing, such as nationalisation or dilution. Indeed, not receiving any dividends during a couple of years is far less burdensome than being required to transfer one's share to the State in the context of a nationalisation. In this sense, a dividend ban is not equivalent to the other forms of burden-sharing.

NB: This burden-sharing measure will be discussed in detail in section 12.8.

12.5.3.7 Consistent application of the burden-sharing principle?

The principle of equal treatment requires that the burden-sharing principle should be applied consistently. If the Commission accepts in one case a lower level of burden-sharing than in other cases, then this amounts to an inconsistency (provided there is no justification for the lower level of burden-sharing). This raises the following questions: *Firstly*, does the Commission require a minimum level of burden-sharing? *Secondly*, can the same level of burden-sharing be attained by the different types of burden-sharing? And *thirdly*, can a lower level of burden-sharing be justified?

As regards the first question, it should be recalled that the 2013 Banking Communication requires full burden-sharing by shareholders. In the period before the adoption of this Communication, there were no ex ante thresholds for burden-sharing. Nevertheless, the Commission required that burden-sharing was 'appropriate'.[87] In some decisions, the Commission speaks of 'proper' burden-sharing.[88]

As regards the second question, it should be noted that the exact level of burden-sharing depends on the modalities of the burden-sharing measures. In that regard, the previous subsections have shown that a nationalisation without any compensation, a complete (or almost complete) dilution or remaining at the bank in liquidation are equivalent to each other in terms of how burdensome these burden-sharing measures are.

87. Hypo Group Alpe Adria (HGAA), SA.32554, 3 September 2013, para. 126; BayernLB, SA.28487, 5 February 2013, para. 202.
88. Eurobank, SA.43363, 26 November 2015, para. 97.

As regards the third question, it should be pointed out that there can be a justification for the limited burden-sharing. For instance, in the case of First Investment Bank (FIB), there was – apart from a dividend ban – no burden-sharing by shareholders. This was justified by the fact that FIB did not have a capital shortfall.[89] FIB only benefited from liquidity support.

Another case is the case of Crédit Immobilier de France (CIF). The Commission explicitly held that CIF constituted a special case ("*un cas bien particulier*"). CIF was dependent on wholesale financing. Due to a downgrade, CIF experienced significant refinancing problems. Nevertheless, CIF was still a solvent institution when it was liquidated in 2013.[90] This justified a moderation of the burden-sharing principle ("*eu égard à cette particularité du CIF, il convient de tempérer exceptionnellement le principe d'une contribution propre des actionnaires*").[91]

The justification of the limited burden-sharing means that the limited burden-sharing in some cases does not amount to an inconstant application of the burden-sharing principle. However, no justification can be found in the decisions on KBC, FIH and Liberbank.

12.5.4 Impact of the BRRD

The BRRD is based on the principle that the shareholders of the bank under resolution should bear first losses.[92] This principle thus requires full burden-sharing by shareholders. It should be stressed that this principle is only applicable when a bank is put into resolution. If a State aid measure does not trigger resolution, then Art. 34(1)(a) BRRD is not applicable. This does, however, not mean that there can be less burden-sharing in such a case, because point 41 of the 2013 Banking Communication also requires that losses are first absorbed by equity. In fact, point 41 of the 2013 Banking Communication and Art. 34(1)(a) BRRD both require full burden-sharing by shareholders. Thus, as regards burden-sharing by shareholders, the State aid control framework and the recovery and resolution-framework are consistent with each other.

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89. First Investment Bank (FIB), SA.39854, 25 November 2014, para. 108.
90. Annual report CIF Euromortgage 2013, p. 10: "Unlike other government assistance requests that the European Commission had processed, there was no need from the outset either to recapitalize Crédit Immobilier de France or to guarantee its assets, because its shareholders' equity was largely sufficient to cover severe stress scenarios. Only the Group's funding model, based exclusively on recourse to the financial markets, necessitated recourse to a State guarantee in order to ensure that Crédit Immobilier de France could continue to secure funding for its future needs."
91. Crédit Immobilier de France (CIF), SA.37029, 27 November 2013, para. 99-100.
92. This principle is laid down in Art. 34(1)(a) BRRD.

As explained in section 4.4.4, in the bank State aid decisions that were taken after the adoption of the BRRD, the Commission assessed whether the aid measures violated intrinsically linked provision of the BRRD. As regards burden-sharing by shareholders, the intrinsically linked provision is Art. 34(1)(a) BRRD. Therefore, in the decisions on CCB, Panellinia Bank, MKB Bank and Banif – i.e. the decisions taken after the adoption of the BRRD – the Commission assessed whether the aid measure was in line with Art. 34(1)(a) BRRD.

To give an example, in its decision on Panellinia Bank[93], the Commission noted that the equity of Panellinia Bank was not transferred to the acquiring bank, but left in the liquidated entity. Therefore, the shareholders were fully wiped out and would suffer 100% losses.[94] Consequently, the resolution measure was in line with Art. 34(1) BRRD.

It should be recalled that in the case of CCB (discussed in subsection 12.5.3.2), there was only a 99% dilution. However, the fact that there was only a 99% dilution (and not a 100% dilution) did not prevent the Commission from concluding that the provisions of the aid measure were in line with Art. 34(1)(a) BRRD.[95] This case illustrates that the State aid control framework and the recovery and resolution-framework are consistent with each other.

12.5.5 Concluding remarks

This section has discussed the various types of burden-sharing by shareholders. Whether these types are equivalent to each other (in terms of how burdensome they are) depends on the exact modalities of the burden-sharing measures. In that regard, it should be noted that the 2013 Banking Communication has contributed greatly to a consistent application of the burden-sharing principle (see subsection 12.5.3.7). From that viewpoint, I welcome the adoption of the 2013 Banking Communication.

12.6 Burden-sharing by hybrid and subordinated debt holders

* *The fact that the beneficiary bank conducted a liability management exercise (LME).*

* *The fact that the subordinated debt is completely written-down.*

* *The fact that subordinated debt holders are not transferred to the acquiring bank, but remain in the bad bank or the entity in liquidation.*

* *The fact that the beneficiary bank is subject to a coupon ban.*

93. This case was discussed in subsection 12.5.3.4.
94. Panellinia Bank, SA.41503, 16 April 2015, para. 113.
95. CCB, SA.43367, 18 December 2015, para. 122.

12.6.1 Why are these characteristics relevant?

Burden-sharing is not only required by the bank's shareholders, also the bank's creditors have to participate in the bank's restructuring (and/or resolution). This is sometimes referred to as "creditor participation". It should be noted that not all creditors have to participate; burden-sharing is usually only required by the *subordinated* creditors. This changed with the introduction of the bail-in tool in the BRRD. Burden-sharing by senior creditors will be discussed in section 12.7.

Just as burden-sharing by shareholders can be achieved in different ways, burden-sharing by subordinated debt holders can be achieved in different ways: in some cases, a liability management exercise (LME) was conducted; in some cases, the subordinated debt was completely written-down; in some cases involving a transfer of the ailing bank to a larger, viable bank, the subordinated debt remained at the bank in liquidation. In addition, in many cases, a coupon ban was imposed on the bank.

The above-mentioned relevant characteristics constitute the various ways in which burden-sharing by subordinated debt holders can be achieved.

12.6.2 Has the Commission consistently taken into account these relevant characteristics?

In every bank State aid case, the Commission assesses whether the burden-sharing requirement is met. This assessment involves assessing whether one of the various types of burden-sharing is present; in other words: assessing if there is a LME, write-down, coupon ban or (in case of a split-up) a non-transfer of the debt instruments to the good bank. An overview of which bank State aid case is characterised by which form of burden-sharing is provided in the table in Annex IX.

It should be noted that there are some decisions in which it is not clearly recognised that a certain type of burden-sharing occurred: the decision on the Belgian bank KBC does not clearly mention whether KBC conducted a liability management exercise (LME). In the assessment of burden-sharing, the Commission noted that because of the coupon ban, "subordinated debt holders will receive limited remuneration and thus contribute to the restructuring".[96] This implies that the coupon ban is the only form of burden-sharing by subordinated debt holders. However, in the description-part of the decision, it was indicated that KBC "intends to buy, as it has already done in recent months, hybrids at below par value, thus generating a profit that boosts core capital".[97] This repurchase programme for hybrid loans corresponds to a LME. In the 2009 Annual

96. KBC, C18/2009, 18 November 2009, para. 166.
97. KBC, C18/2009, 18 November 2009, para. 60.

Report of KBC, more information can be found on this repurchase programme for hybrid loans.[98] Thus, KBC conducted a LME, but this was not explicitly taken into account by the Commission in its assessment of the burden-sharing by subordinated debt holders.

In addition, the various types of burden-sharing are not equally burdensome. This will be discussed in the following subsection.

12.6.3 How are these relevant characteristics elaborated in the decisions?

12.6.3.1 Liability management exercise (LME)

A liability management exercise (LME) means that a bank offers to buy back certain debt instruments, or to convert certain debt instruments into equity.[99] The debt instruments are normally bought back at a discount. Hence, a LME serves as burden-sharing by subordinated debt holders. The fact that the beneficiary bank performed a liability management exercise is thus relevant in the context of burden-sharing.

In every LME, three values are of importance: i) the market value of the debt instruments, ii) the nominal value of the debt instruments, and iii) the price at which the debt instruments are bought back. The buyback price will usually be set between the market value and the nominal value. The fact that the buyback price is lower than the nominal value means that there is a discount (or 'haircut'). This results in a capital gain for the bank. A buyback price which is higher than the market value means that there is a premium on top of the market value; this encourages investors to participate in the LME.[100]

Regarding terminology, it should be pointed out that the term "LME" is not always used; a LME can go by many names. A LME usually concerns subordinated debt. Consequently, a LME is usually referred to as "subordinated

98. "Towards the end of the year, KBC decided to buy back a number of outstanding hybrid issues (see table). This repurchase transaction was concluded on 13 October 2009, with 70% of the nominal value being paid in each instance. In total, approximately 72% of the outstanding amount of the relevant hybrid loans was repurchased for a total nominal amount of 1.1 billion euros. KBC paid for the transaction using its available cash. The repurchase programme had a positive impact of 0.1 billion euros (after tax) on the results, and a positive effect of 0.19% on the group's core tier-1 ratio." (KBC 2009 Annual Report, p. 14.)
99. Footnote 30 of the AIB decision gives a definition of a LME and remarks that a LME can also take the form of a reduction in the face value of the debt or an early redemption at other than face value.
100. There are some cases (such as the case of Anglo) in which the buyback price or conversion price is below the market value. Investors would normally not accept such an offer, but in the case of Anglo the 'exit consent' served as an inducement for investors to participate in the LME.

liability exercise (SLE)". Sometimes, the terms "debt buyback" or "debt repurchase" are used; and in the case of a conversion, the specific terms "Debt for Equity Offer" or "exchange offer" may be used. In this section, the term "LME" will be used.

How is the fact that the bank has conducted a LME taken into account by the Commission? Consider the following recital:

> "The Bank's subordinated debt holders have contributed to paying for the restructuring costs of the Bank. The Bank performed several liability management exercises in order to generate capital. The total amount of liabilities exchanged amounted to EUR 748 million, with a capital gain of EUR 565 million, as described in recitals (122) and (123)".[101]

This recital is from the decision on Eurobank.[102] The above-cited recital forms part of the assessment on burden-sharing. The assessment seems quite succinct, since the cited recital consists of only three sentences. However, it refers to recitals 122 and 123, which provide a description of the LME's conducted by Eurobank. These recitals read as follows:

> "In February 2012 the Bank offered to buy back hybrid instruments from private investors at a price between 40% and 50% of their nominal value. That buy-back price was determined on the basis of the market value of the instruments and contained a premium of not more than ten percentage points, which was added to encourage investors to participate in the buy-back. The offer was accepted for almost 50% of the instruments' total nominal value which, after taking the costs of the transaction into consideration, left the Bank with a profit of EUR 248 million.
>
> In May 2013 the Bank announced another liability management exercise. The Bank offered debt holders the opportunity to convert their lower tier one and lower tier two securities, with an outstanding amount of EUR 662 million, into ordinary shares, at par. The conversion price was set so as to equal the subscription price paid by the HFSF in the Spring 2013 recapitalisation. The acceptance rate was 48%. Since the lower tier one and lower tier two bond holders converted their securities into lower subordinated instruments with no cash consideration, the capital raised reached EUR 317 million.

101. Eurobank, SA.34825, 29 April 2014, para. 393.
102. This decision is one of the four Restructuring Decisions that were taken in 2014 with respect to the four largest Greek Banks. In chronological order, these decisions were Eurobank (29 April 2014), Alpha Bank (9 July 2014), Piraeus Bank (23 July 2014) and National Bank of Greece (23 July 2014). An interesting feature of these decisions is that they are structured in the same way and contain similar considerations.

> As a result of the two buy backs, the stock of subordinated and hybrid debt decreased from EUR 1 045 million at 31 December 2011 to EUR 283 million at 31 December 2013."

As is indicated by these recitals, Eurobank has conducted several LME's. Each LME-transaction has its own modalities. Information on these modalities can be found in the above-cited recitals. The *first* modality is the form in which the LME takes place: the 2012 LME were Tender Offers (i.e. debt buyback), while the 2013 LME was an Exchange Offer (i.e. a conversion). *Secondly*, the types of securities that are subject to the LME are mentioned. For instance, the LME conducted in 2013 concerned lower tier one and lower tier two securities. More detailed information is not given in the Decision. This information can sometimes be found on the website of the bank.[103] *Thirdly*, some information is provided on the price at which the securities are bought back. In the above-cited recitals, it is indicated that the price is based on the market value and that it included a premium (of not more than 10%). Furthermore, the securities are bought back at a discount to the nominal value. This discount (or haircut) creates a capital gain. *Fourthly*, the acceptance rate is mentioned. *Finally*, the capital gain resulting from the LME is indicated.

Voluntary LME's

Participation in a LME can be mandatory or voluntary. The LME's performed by the Irish Banks were voluntary. However, there was a strong incentive for investors to participate. In that regard, it has been remarked that the Credit Institutions (Stabilisation) Act 2010[104] served as a threat to subordinated debt holders to accept the LME offer.[105] This is also visible in the statement of the Minister for Finance of 31 March 2011: "If these LMEs fail to deliver the expected Core Tier 1 capital gains to each of the banks, the Government will take whatever steps are necessary under the Credit Institutions (Stabilisation) Act 2010 or otherwise to ensure that burden sharing is achieved. Any further action, after investors have had an opportunity to take part in these LMEs, will result in severe measures being taken in respect of the subordinated liabilities".

And even before this statement of the Minister, there was a strong inducement for investors to participate in the LME. This is illustrated by the case of Anglo-Irish Bank.[106] Anglo conducted LME's in August 2009 and December

103. The Restructuring Decision on Alpha Bank even mentions the corresponding link (in footnote 76 and 77).
104. Pursuant to the MoU, Ireland would implement legislation concerning burden-sharing by subordinated debt holders. Consequently, the Credit Institutions (Stabilisation) Act 2010 was adopted.
105. Murphy 2013, p. 272.
106. Anglo/INBS, SA.32504, 29 June 2011, para. 168 and footnote 64. See also: Dübel 2013a, p. 15.

2010.[107] The October 2010 SME took place through an exchange offer: the creditors were invited to exchange their securities into senior notes. The exchange ratio was 0,2. In other words: for each euro note exchanged, they would receive 20 eurocents of the new senior notes. With respect to the LME, the technique of the "exit consent" was used. This means that the LME included a condition: investors participating in the LME had to vote in favour of an extraordinary resolution. This extraordinary resolution gave Anglo the right to redeem the still outstanding securities concerned at a price of 1 eurocent for every thousand euro. This effectively amounted in an expropriation of the investors that did not participate in the LME. Unsurprisingly, the acceptance rate of the LME was high (92%).[108] To conclude, although the LME was voluntary, the technique of the exit consent served as an incentive for creditors to participate in the LME.

Minimum level of burden-sharing

Does the Commission require a minimum level of burden-sharing? The decisions on the LME's conducted by the Spanish banks are important in this regard. In the decisions on Banco de Valencia, BFA, Banco CEISS, NCG, Catalunya Banc, Banco Gallego, the Commission noted positively that the commitments regarding burden-sharing of hybrid instruments *went beyond the prerequisites of the Restructuring Communication*.[109] In these decisions, the Commission explained that it would consider a cash buyback of hybrid securities at market price plus a 10%-premium to fulfil the requirements of the Restructuring Communication.[110] The LME's performed by the Spanish banks were structured as follows.[111] First, the hybrid and subordinated debt securities[112] were bought back at their net present value. This resulted in an immediate capital gain for the bank, since the debt instruments were bought back at a significant discount ('haircut') from the nominal value of the instruments. Second,

107. Anglo/INBS, SA.32504, 29 June 2011, para. 168.
108. One of the investors, Assenagon, did not participate in the LME. Assenagon claimed that the LME was unlawful and it started legal proceedings. On 27 July 2012, the High Court of Justice of England and Wales (Chancery Division) rendered its judgment. Justice Briggs concluded that the exchange offer and exit consent process carried out by Anglo Irish was unlawful.
109. Banco de Valencia, SA.34053, 28 November 2012, para. 178.
110. BFA Group, SA.35253, 28 November 2012, para. 201. A similar consideration can be found in the Banco de Valencia-decision (para. 178): The Commission considers an exchange of hybrid capital instruments at market price plus a premium into cash to fulfil the requirement of the Restructuring Communication.
111. BFA Group, SA.35253, 28 November 2012, para. 95-106.
112. With respect to dated subordinated debt, there were specific provisions: dated subordinated debt holders would be afforded the opportunity to convert into a more senior debt instrument, in addition to the possibility to also convert into ordinary shares.

the proceeds of the buyback of the debt instruments would automatically take the form of ordinary shares (or other equity-equivalent instruments) of the bank.[113] Consequently, there would be no cash outflow. The conversion into core capital would further reduce the capital needs of the bank.

It should be pointed out that the Commission almost never dismissed a LME as insufficient. Only in the case of Bank of Ireland, the Commission explicitly mentioned that the discount was too low. Bank of Ireland conducted several liability management exercises.[114] With respect to most capital instruments, Bank of Ireland complied with the Commission's policy. However, in one instance, the discount at which a certain capital instrument was bought back by Bank of Ireland was actually too low.[115] The Commission concluded that this particular transaction resulted in insufficient burden-sharing – which should be reflected in the depth of restructuring. The Commission added that "in doing so, account should nevertheless be taken of the isolated nature and limited size of the transaction in question as compared to the significantly more numerous times for significantly larger amounts in which Bank of Ireland fully complied with the Commission's policy".[116] This is the only decision in which the Commission explicitly declared that a LME resulted in insufficient burden-sharing. It illustrates that the Commission does require a minimum discount – and thus a minimum level of burden-sharing.

12.6.3.2 Write-down

A full write-down of subordinated debt occurred in the bank State aid cases that were assessed on the basis of the 2013 Banking Communication. This Communication requires full burden-sharing by shareholders and subordinated debt holders.[117] With respect to the subordinated debt holders, the 2013 Banking Communication stipulates that the liability management exercises should in principle be 100% capital generating (in case of a capital shortfall which cannot be overcome in full).[118]

113. Interestingly, the SLE in the case of Cajatres (20 December 2012, para. 64) was set up differently: subordinated debt instruments were converted into *senior debt instruments*. In the case of Banco Gallego (25 July 2013, para. 60), the proceeds of the buyback would take the form of ordinary shares of Banco Sabadell *or a more senior debt instrument of Banco Gallego*.
114. The annual report of Bank of Ireland contains detailed information about the SLE.
115. Bank of Ireland, SA.33443, 20 December 2011, para. 161-163.
116. Bank of Ireland, SA.33443, 20 December 2011, para. 163.
117. Point 41 of the 2013 Banking Communication.
118. Point 35 of the 2013 Banking Communication.

This type of burden-sharing can be illustrated by the cases of the following five Slovenian banks: Nova Ljubljanska banka (NLB), Nova Kreditna Banka Maribor (NKBM), Abanka, Probanka and Factor Banka.[119] With respect to these banks, the Bank of Slovenia adopted on 18 December 2013 a decision on extraordinary measures.[120] Pursuant to this decision, these banks were required to write down all of the qualified liabilities. For instance, NKBM's subordinated financial instruments (totalling EUR 89.540.000) were written down; this led to an increase of NKBM's income by the same amount.[121] In its decision on NKBM, the Commission noted that "the State capital injections will only be implemented after the complete implementation of the wipe-out of the subordinated debt holders. That sequence ensures that all existing subordinated debt holders have to fully contribute to the restructuring costs of the bank prior to the State stepping in".[122]

12.6.3.3 Remaining at the bad bank or bank in liquidation

In some cases, the bank is split-up into a bad bank and a good bank. The good bank is usually transferred to another bank, while the bad bank is wound-down or liquidated under normal liquidation procedures. In these cases, the shareholders and subordinated debt holders usually remain at the bad bank or bank in liquidation.

How burdensome is remaining at the bad bank for subordinated debt holders? This depends on the financial situation of the bad bank. Furthermore, it depends on the ranking of the subordinated debt holders. To give an example, in the decision on Banca Romagna Cooperativa (BRC), the Commission noted that "while the subordinated debt holders are in principle entitled to the proceeds from the liquidation, the FDGCC has first claim on repayment of the cost of the intervention before other creditors will be served".[123] The Commission concluded that it was not very likely that the subordinated debt holders would benefit from the proceeds of the liquidation.[124]

In the case of the Portuguese bank Banif, the 'sale of business tool' and the 'asset separation tool' were applied: Banif was split-up into a clean bank (to be sold) and a remaining bank (to be wound-down), while a separate asset

119. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 135; Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 154.
120. Based on the Slovenian Banking Act.
121. The summary of the Decision on extraordinary measures imposed on NKBM is reproduced in the 2013 annual report of NKBM (page 29).
122. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 135.
123. Banca Romagna Cooperativa (BRC), SA.41924, 2 July 2015, para. 71.
124. Banca Romagna Cooperativa (BRC), SA.41924, 2 July 2015, para. 71.

bundle had been carved out in resolution into an Asset Management Company. In addition, the bail-in tool – which under the Portuguese implementation law of the BRRD was already applicable in 2015 – was applied.[125] All subordinated creditors of the bank would be left in the Remaining Bank, subordinated to the claims of the resolution authority on the remaining assets so that they would effectively absorb losses.[126] The Commission concluded that as a result, subordinated debt holders have contributed to the maximum extent possible, thereby satisfying the burden-sharing requirement.[127]

This form of burden-sharing was not always possible. For instance, in the decision on Caja Castilla-La Mancha (CCM), the Commission noted that due to legal constraints, subordinated debt holders had to be transferred to the acquiring bank (Banco Liberta).[128] Nevertheless, in most cases in the S/T/W-context, the subordinated debt was not transferred, thus ensuring burden-sharing by subordinated debt holders.

12.6.3.4 Coupon ban

Many beneficiary banks were subject to a coupon ban. This constitutes burden-sharing by hybrid and subordinated debt holders. Usually, a coupon ban is imposed in combination with another form of burden-sharing.

In some cases, there is no coupon ban, but this can be explained by the fact that because of the LME there is no subordinated debt left. For instance, in its decision on National Bank of Greece (NBG), the Commission observed that as a consequence of the conversion, NBG had no outstanding hybrid capital and subordinated debt instruments held by private investors. The Commission therefore accepted the termination of the commitment not to pay coupon and not to repurchase such instruments. The Commission considered that those commitments were no longer necessary to ensure burden-sharing by historical subordinated debt instruments, since such instruments no longer existed.[129]

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125. Banif, SA.43977, 21 December 2015, para. 131.
126. Banif, SA.43977, 21 December 2015, para. 87 and 142.
127. Banif, SA.43977, 21 December 2015, para. 144.
128. Caja Castilla-La Mancha (CCM), NN61/2009, 29 June 2010, para. 71 and 194. However, in order to ensure burden-sharing, Banco Liberta would not exercise any call options during the period it enjoyed financial support from the FGD (the Spanish Deposit Guarantee Fund), i.e. for a period of five years through the guarantee on the impaired asset portfolio. See also: BPN, 24 October 2011, para. 112-114; BPN, 27 March 2012, para. 239-244.
129. National Bank of Greece (NBG), SA.43365, 4 December 2015, para. 140. The same consideration can be found in Bank of Ireland, SA.33443, 20 December 2011, para. 164.

In some cases, there appears to be full burden-sharing by subordinated debt holders. However, at the same time, a coupon ban is imposed. How can this be explained? The case of SNS REAAL can serve as an illustration. On 1 February 2013, SNS REAAL was nationalised and all subordinated debt holders were expropriated. Only the subordinated bonds issued by SRLEV (a subsidiary of SNS REAAL) were not expropriated. As a result, these subordinated securities still existed and were affected by the coupon ban.[130]

It should be noted that in several cases, the coupon ban was the only form of burden-sharing by hybrid and subordinated debt holders.[131] Since the coupon ban is less burdensome than a LME or full write-down, the fact that there are some cases in which the Commission accepted the coupon ban as the only burden-sharing measure raises the question whether the Commission has consistently applied the burden-sharing principle. This question will be addressed in the next subsection.

12.6.3.5 Consistent application of the burden-sharing principle?

The principle of equal treatment requires that burden-sharing by subordinated debt holders is interpreted *consistently* by the Commission. The 2013 Banking Communication contributed greatly to a consistent application of the burden-sharing principle, since it raised the minimum requirements for burden-sharing. By contrast, in the pre-2013 Banking Communication era, several indications can be found that point at an inconsistent application of the burden-sharing principle. This inconsistency can occur at two levels.

In the first place, the previous subsections have shown that there are different types of burden-sharing measures (i.e. LME, full write-down, remaining at the bank in liquidation, coupon ban). These different types are not equally burdensome. This is most evident with respect to the coupon ban. As discussed in the previous subsection, there are some cases in which the Commission accepted the coupon ban as the only burden-sharing measure. That situation was put to an end by the 2013 Banking Communication.

In the second place, it should be recalled that the level of burden-sharing depends on the modalities of the burden-sharing measure. However, it can be observed that the modalities are not always taken into account in the burden-sharing assessment. This can be illustrated by contrasting the decision on

130. See the press release of SNS REAAL of 28 March 2013, ‘SRLEV postpones coupon payment at the request of the EU’.
131. An overview of these cases is provided in the table in Annex IX.

Eurobank with the decision on Piraeus Bank. The assessment of the LME in the case of Piraeus Bank is almost similar to that of Eurobank. However, the description of the LME indicates that the cases differ on some of the aspects of the LME. For instance, recital 123 of the Eurobank-decision indicates that the acceptance rate of the 2013 LME was 48%. Piraeus Bank, only achieved an acceptance rate of 20% when it conducted a LME in 2013.[132] So there is a difference, but this difference did not lead to a different conclusion: in both decisions, the Commission concluded that there was sufficient burden-sharing by the subordinated debt holders. Admittedly, the acceptance rate is not the only aspect of a LME and the conclusion was based on all the LME-transactions performed by the bank. Nonetheless, the fact that the difference on this aspect of the LME did not lead to a different conclusion, raises the question whether the approach of the Commission towards burden-sharing by means of a LME was consistent.

In the 2013 Banking Communication era, burden-sharing by subordinated debt holders is in principle always required. A low level of burden-sharing is thus no longer allowed. Nevertheless, there can be a *justification* for a low level (or absence) of burden-sharing.[133] In that regard, it should be noted that in a few cases, there was no burden-sharing by subordinated debt holders: in the case of CCB and MKB Bank, there was no LME or any other form of burden-sharing by subordinated debt holders. This can, however, be explained by the simple fact that there were no outstanding subordinated debt instruments in these cases. The absence of burden-sharing by subordinated debt holders in these cases does therefore not amount to an inconsistency.

Another justification can be found in the decision of 26 November 2015 on Alpha Bank. The background of that case was as follows: the comprehensive assessment conducted in the context of the SSM revealed a capital shortfall. Alpha Bank would try to raise capital from private investors, while the Hellenic Financial Stability Fund ("HFSF") would act as a backstop. Effectively, this backstop was an underwriting commitment (i.e. a commitment to provide the amount of capital needed to cover the capital shortfall in case it was not provided by private investors). In that context, Greece made the commitment to bail-in subordinated creditors before any capital support would have been

132. Piraeus Bank, SA.34826, 23 July 2014, para. 134.
133. See also SNS REAAL, SA.36598, 19 December 2013, para. 92: "Taking into account the genesis of measure A2, the specificities of this case (cfr separate legal entities with their own capital position) and in particular that commitment related to capital transfers, the Commission can accept that in the case at hand the increased burden-sharing requirements of the 2013 Banking Communication do not apply for the hybrid debt-holders of REAAL Insurance."

actually paid out to the bank by the HFSF. In the end, Alpha Bank successfully raised enough private capital to cover the capital shortfall determined by the comprehensive assessment. Consequently, the bail-in of the subordinated debt did not take place.

The underwriting by the HFSF constituted State aid, but the burden-sharing by subordinated debt holders would only take place in case of a recapitalisation by the HFSF. In that regard, the Commission considered on the basis of point 45 of the 2013 Banking Communication that disproportionate results would follow if the bail-in of subordinated debt and hybrid capital had to occur already at the moment of the underwriting commitment. The commitment by Greece to bail-in subordinated creditors before any capital support would have been actually paid out to the bank is therefore sufficient to ensure proper burden-sharing.[134]

It is noteworthy that in the decision on Alpha Bank, the Commission referred to point 45 of the 2013 Banking Communication. Point 45 provides for an exception to the burden-sharing requirements (laid down in points 43 and 44). This exception can be made when burden-sharing would endanger financial stability or lead to disproportionate results. Point 45 further explains that this exception could cover cases where the aid amount is small in comparison to the bank's RWA and the capital shortfall has been reduced significantly in particular through capital raising measures.[135]

When there is no justification for a low level (or even a total absence) of burden-sharing, the Commission will not authorise the State aid. This can be illustrated by the case of Banca Tercas. In this case, the subordinated debt was not converted nor written-down. The parties claimed that "the option of bailing-in the subordinated debt was not legally feasible under the then applicable Italian legislation and that debt can be written down only in case of compulsory administrative liquidation".[136] The Commission did not accept this argument. The Commission concluded that the subordinated creditors had not contributed to the maximum extent possible.[137] In other words: the burden-sharing requirement was not met. Moreover, Italy did not submit a restructuring plan for Banca Tercas. As a result, the State aid was incompatible and the Commission ordered the recovery of the aid.

134. Alpha Bank, SA.43366, 26 November 2015, para. 96. See also: Eurobank, SA.34825, 29 April 2014, para. 400, and Eurobank, SA.43363, 26 November 2015, para. 97.
135. For an application of point 45 of the 2013 Banking Communication, see: Banco CEISS, SA.36249, 12 March 2014, para. 102-104; Alpha Bank, SA.43366, 26 November 2015, para. 96.
136. Banca Tercas, SA.39451, 23 December 2015, para. 203.
137. Banca Tercas, SA.39451, 23 December 2015, para. 207.

To conclude, in the 2013 Banking Communication era, burden-sharing by subordinated debt holders is in principle always required. Authorising State aid without requiring proper burden-sharing by subordinated debt holders would thus be inconsistent. However, as illustrated by the case of Alpha Bank, there is no inconsistency if there is a justification for a low level of burden-sharing.

12.6.4 Impact BRRD

Art. 34(1)(b) BRRD requires that creditors of the bank under resolution should bear losses after the shareholders in accordance with the order of priority of their claims under normal insolvency proceedings. In other words: it requires full burden-sharing by subordinated debt holders. As regards burden-sharing by subordinated debt holders, the State aid control framework and the recovery and resolution-framework are consistent with each other.

Point 46 of the 2013 Banking Communication stipulates that the 'no creditor worse off-principle' should be adhered to. This means that subordinated creditors should not receive less in economic terms than what their instrument would have been worth if no State aid were to be granted. The 'no creditor worse off-principle' is also enshrined in Art. 34(1)(g) BRRD and Art. 15(1)(g) SRM-Regulation. Thus, also with respect to the safeguards for creditors, the State aid control framework and the recovery and resolution-framework are consistent with each other.

12.6.5 Concluding remarks

Section 12.5 already highlighted the relevance of the 2013 Banking Communication for the burden-sharing by *shareholders*. The 2013 Banking Communication is equally relevant for the burden-sharing by *subordinated debt holders*. Indeed, this Communication establishes clear burden-sharing requirements. For that reason, a distinction can be made between the period after the adoption of the 2013 Banking Communication and the pre-2013 Banking Communication era. While in the pre-2013 Banking Communication era, several indications can be found that point at an inconsistent application of the burden-sharing principle, there are no such inconsistencies in the period after the adoption of the 2013 Banking Communication (see subsection 12.6.3.5).

12.7 Burden-sharing by senior creditors

12.7.1 A relevant characteristic?

The Crisis Communications do not require burden-sharing by senior creditors. Accordingly, most bank State aid cases are characterised by an absence of burden-sharing by senior creditors. But there are a few notable exceptions:

The case of Amagerbanken
Amagerbanken was a Danish bank. Amagerbanken was wound-up under the Danish winding-up scheme.[138] Under this scheme, the FSC would create a subsidiary bank (New Bank[139]) that would acquire the assets of the failing bank (Old Bank). New Bank would also take over the unsubordinated liabilities for an amount equal to the value of the assets, on a pro-rata basis. This means that shareholders and subordinated debt holders were left behind at the Old Bank. Senior creditors were protected though not fully, since they were taken over at a haircut (depending on the value of the assets).

Accordingly, in the case of Amagerbanken, equity and subordinated liabilities were not transferred to the New Bank, but remained in Amagerbanken. Guaranteed liabilities were taken over at their nominal value, while unguaranteed liabilities were provisionally transferred at the level of 58,8% of their nominal value. This means a haircut of 41,2%.[140]

The haircut for senior creditors of Amagerbanken had a significant impact on the funding costs of Danish banks. Because of the haircut for senior creditors, Moody's downgraded several Danish banks.[141] This lead to funding problems for some Danish banks. In its decision of 9 December 2011, the Commission observed that "as a consequence of the application of the winding-up scheme in several cases senior creditors have taken losses which is unique in the European Union and which has increased the Danish bank's funding costs".[142]

138. This scheme was approved by the Commission on 30 September 2010 (case N407/2010). The aid to Amagerbanken was notified for individual assessment, because of the size of Amagerbanken (the balance sheet exceeded the threshold of EUR 3 billion).
139. New Bank is in fact a bridge bank. It will cease its activities within a limited time-frame: it will not grant any new loans. Instead, it will actively seek to dispose assets and liabilities. This minimises competition distortions.
140. The initial percentage was 58,8%. However, as a result of the final valuation of the assets, the compensation to creditors was increased to 84,4% (resulting in a haircut of 15,6%).
141. Denmark – Guarantee for merging banks, SA.34227, 17 February 2012, para. 6.
142. Denmark – Prolongation of the winding-up scheme and Extension of the Compensation scheme to Model I and Model II, SA.33575, 9 December 2011, para. 35.

In 2011, Denmark introduced the compensation-scheme, in addition to the winding-up scheme. Under the compensation-scheme, senior creditors did not suffer losses. In its decision from August 2011, the Commission considered this to be acceptable, since the burden-sharing requirement of the Restructuring Communication did not extend to senior creditors.[143]

Consequently, there is an important difference between Amagerbanken (which was wound-down under the original scheme) and Fionia Bank. In the latter case, there was no burden-sharing by senior creditors, since only equity and subordinated debt remained at Old Fionia.

The case of Anglo Irish Bank

Although there was no burden-sharing by senior creditors in the case of Anglo Irish Bank, such a burden-sharing was *contemplated* by the Irish authorities. However, the ECB advised the Irish State to not bail-in the senior debt.[144] The Economic Adjustment Programme for Ireland explains the choice to spare the senior creditors:

> "For legal reasons, but also to avoid contagion to other parts of the financial system both in Ireland and elsewhere in the euro area, the measures agreed with the Irish authorities do not include steps that would affect senior debt holders".[145]

The question of burden-sharing by senior creditors was briefly addressed by the Commission in its decision on Anglo Irish Bank. In the decision, the Commission considered that it was legitimate to assess whether burden-sharing by senior creditors could not be achieved. However, the Commission went on to consider that it "had not received any detailed proposal on how to make the senior creditors participate in the burden-sharing without increasing the cost of the resolution for the State".[146]

In the literature, it has been remarked that the approach to burden-sharing by bank creditors has evolved over time.[147] In the early stages of the financial crisis, governments were very cautious not to scare off bank creditors. The case of Anglo Irish Bank illustrates that in 2011, burden-sharing by senior creditors was deemed too risky.

143. Amendment of the Danish winding-up scheme for credit institutions, SA.33001, 1 August 2011, para. 83.
144. Lenihan 2012; Honohan 2013, p. 15; Schoenmaker 2015, p. 11.
145. The Economic Adjustment Programme for Ireland, point 39.
146. Anglo/INBS, SA.32504, 29 June 2011, para. 170.
147. Micossi, Bruzzone & Carmassi 2013, p. 9. See also: N. Veron and G.B. Wolff, 'From supervision to resolution: Next steps on the road to European banking union', p. 6.

The case of Cyprus

In the context of an Economic Adjustment Programme, Cyprus received financial assistance from the EU-IMF. The euro area countries agreed to a package of financial assistance of up to EUR 10 billion for Cyprus.[148] This rescue package was agreed upon on 25 March 2013.[149] An important feature of the rescue package for Cyprus was that to some extent *depositors* were included in the bail-in.

The Programme provided for a reform of the Cypriot banking sector:

- Bank of Cyprus ("Trapeza Kyprou") was recapitalised through the bail-in of shareholders and creditors of the bank and through the conversion of 47,5% of uninsured deposits (i.e. deposits above EUR 100.000) into equity.
- Cyprus Popular Bank (Laiki) was split-up into an entity in liquidation and a good part which was transferred to Bank of Cyprus. All uninsured deposits (i.e. deposits below EUR 100.000) remained at the entity in liquidation, while the insured deposits were transferred to Bank of Cyprus.
- NB: Since the bail-in was sufficient, no programme money was used to recapitalise Laiki or Bank of Cyprus.
- Hellenic bank was able to raise private capital. Consequently, this bank did not need State aid.
- CCB/CCI received State aid, which was financed by programme money.[150]

The uninsured depositors of Bank of Cyprus and Cyprus Popular Bank (Laiki) were bailed in. By contrast, there was no bail-in of depositors of CCB and Hellenic Bank.

The rescue package thus included burden-sharing by uninsured depositors (i.e. above EUR 100.000). Interestingly, the initial rescue package even included *burden-sharing by small depositors*: the initial rescue package proposed a levy of 6,75% on insured deposits (below EUR 100.000) and a levy of 9,9% on uninsured deposits (above EUR 100.000). The initial rescue package was however rejected by the Cypriot Parliament.

In the literature, it has been remarked that the initial rescue package showed "the political willingness on the part of the eurogroup to make savers bleed for their choice of a particular bank, or even banking system".[151] However, it has

148. The ESM would finance up to EUR 9 billion and the IMF around EUR 1 billion.
149. On 24 April 2013, an Economic Adjustment Programme was agreed between Cyprus and the Troika (Commission, ECB and IMF). On 25 April 2013, the Council adopted Decision 2013/236/EU. This Council Decision contained the main elements of the macroeconomic adjustment programme to be implemented by Cyprus. On 26 April 2013, a Memorandum of Understanding on Specific Economic Policy Conditionality (MoU) was signed by Cyprus and the Commission (acting on behalf of the ESM). This MoU set out the policy conditionality of the rescue package.
150. See: State aid case SA.35334.
151. Smits, 2014, p. 150. Avgouleas & Goodhart (2015, p. 16) remark that "the aim to penalize Russian creditors of Cypriot banks might have played a significant role in the way that 'rescue' was structured".

also been noted that the bail-in of small depositors in the initial rescue package "was later regretted for its potentially disruptive impact on depositor confidence throughout the Union, and numerous official statements tried to assure that it would not happen again".[152]

12.7.2 Impact of the 2013 Banking Communication?

The 2013 Banking Communication does not require burden-sharing by senior creditors. Nevertheless, some cases that were assessed under the 2013 Banking Communication are characterised by burden-sharing by senior creditors. For instance, in the decision on National Bank of Greece (NBG), the Commission noted the following:

> "The contribution of both the hybrid capital and subordinated debt holders, *and that of the senior unsecured debt holders*, was already partially achieved with the 2015 LME. The results of 2015 LME ended with participation rates of respectively […] %, […] % and […] % for senior bonds, junior bonds and hybrid securities, generating EUR 717 million of capital. With regard to the *contribution obtained from the senior creditors*, the 2015 LME exceeded the minimum level burden-sharing sought for State aid purposes, which does not require contributions of senior unsecured debt holders".[153] [Italics mine, *REvL*]

Even though this case is characterised by burden-sharing by senior creditors, the Commission underlines that contributions of senior unsecured debt holders are not required (by the 2013 Banking Communication).

In several other cases assessed under the 2013 Banking Communication, there was no burden-sharing by senior creditors. For instance, in the decision on the Slovenian bank Probanka, the Commission noted as follows:

> "According to the orderly winding down plan, the main objective of the Bank's orderly winding down is *to repay all ordinary creditors* (excluding subordinated ones) so as to maintain the trust of the public in the stability of the financial system. For that purpose, the Bank will ensure that repayments of contractually agreed amounts are made to all ordinary creditors (excluding subordinated ones) on maturity".[154] [Italics mine, *REvL*]

152. Micossi, Bruzzone and Carmassi 2013, p. 10.
153. National Bank of Greece (NBG), SA.43365, 4 December 2015, para. 138.
154. Probanka, SA.37642, 18 December 2013, para. 18. See also: Facto Banka, SA.37643, 18 December 2013, para. 17.

These recitals illustrate that burden-sharing by senior creditors is not a regular feature of cases assessed under the 2013 Banking Communication. Thus, this Communication did not have an impact on burden-sharing by senior creditors. By contrast, the BRRD had a huge impact – as will be set out in the next subsection.

12.7.3 Impact BRRD

The importance of the BRRD cannot be overstated. The BRRD introduces the bail-in tool, and unlike the 2013 Banking Communication, the BRRD does not exempt senior creditors. On the contrary, under the BRRD, all creditors have to bear losses, unless they are excluded from the scope of the bail-in tool by Art. 44(2) or (3) BRRD. Pursuant to Art. 44(2)(a) BRRD, covered deposits are excluded from the scope of the bail-in.

12.8 Coupon and dividend ban

12.8.1 The modalities of the coupon and dividend ban

As explained in sections 12.5 and 12.6, Member States usually commit that the beneficiary bank shall not to pay any dividends and coupons or exercise calls on subordinated debt instruments and hybrid capital instruments during the restructuring period. This commitment is regarded favourably by the Commission, because it ensures burden-sharing by the shareholders, hybrid capital holders and subordinated debt holders of the bank. Since the coupon ban and the dividend ban are usually bracketed together in the decisions[155], these bans will be analysed together in the present section. In particular, the present section will zoom in on how the coupon and dividend ban is elaborated in the decisions. To that end, the modalities of the coupon and dividend ban will be analysed. These modalities concern the *duration* of the coupon and dividend ban (see subsection 12.8.1.1), the *limitations* of the coupon and dividend ban (see subsection 12.8.1.2) and the *exceptions* to the coupon and dividend ban (see subsection 12.8.1.3).

155. For instance, the coupon and dividend ban in the decision on BES was formulated as follows: "The Bridge Bank and the Bad Bank will not pay any coupons on hybrid capital instruments or dividends on own funds instruments and subordinated debt instruments."

12.8.1.1 Duration of the coupon and dividend ban

As a general rule, the coupon and dividend ban applies throughout the restructuring period.[156] It is sometimes stipulated that the coupon and dividend will cease to apply when the State's shareholding in the bank has been fully divested. For instance, the coupon ban in the case of CCB/CCI was applied for the entire period during which Cyprus participated in the ownership structure of the CCB.[157]

In some cases, the duration of the coupon ban is conditional upon the fulfilment of the LME. For instance, one of the commitments in the case of Banco CEISS was that "until the burden sharing measures provided for in section 7 of this Term Sheet will have been implemented BANCO CEISS will not make any payments to holders of preference shares and subordinated debt instruments in so far as those payments are not owed on the basis of a contract or the law." The burden-sharing measures mentioned in this commitment relate to the LME. The same commitment can be found in other Spanish cases, such as NCG, BFA Bankia, Catalunya Banc, Banco Mare Nostrum and Liberbank.

Also in the W-context, the duration of the coupon and dividend ban is related to the fulfilment of the burden-sharing measures. For instance, in the case of Probanka, the burden-sharing measures entailed that the shareholders and subordinated debt holders would be fully wiped out.[158] The coupon and dividend ban entailed that Probanka would not make any dividend and coupon payments until the burden-sharing measures have been fully implemented.[159]

Sometimes, the duration of the dividend/coupon ban is determined by specific circumstances. For instance, in the case of ABN AMRO, the Commission considered that in approximately two years' time, ABN AMRO Group should have restored its viability. Against that background, a hybrid coupon and hybrid call ban of 2 years seemed to provide appropriate burden-sharing from the bank's capital holders.[160]

The coupon ban in the case of Bank of Ireland applied from 1 February 2010 to 31 January 2011. The final date had a specific reason: on 31 January 2011, Bank of Ireland had to pay a coupon to the State on the State's remaining preference shares. The Commission accepted that the coupon ban could not be

156. It is usually stipulated that all commitments apply during the restructuring period, except where it is provided that they cease to apply at an earlier or later date.
157. CCB, SA.35334, 24 February 2014, annex, point 1.
158. Probanka, SA.37642, 18 December 2013, Annex D.
159. Probanka, SA.37642, 18 December 2013, Annex E.
160. ABN AMRO, C11/2009, 5 April 2011, para. 315. Also in the case of RBS and LBG, the duration of the coupon and dividend ban was 2 years.

extended further without endangering the capital raising exercise, as outside investors would not accept further dilution as would occur if the coupon on the government preference shares were to be paid in common stock again.[161]

The dividend ban in the case of NordLB had a special feature: if the contingent asset guarantee was activated, the duration of the dividend ban would be extended for two years. The Commission noted that this ensured an incentive structure for limiting the aid to the minimum.[162]

To recapitulate, the duration of the coupon and dividend ban can be: i) equal to the restructuring period; ii) related to the fulfilment of the burden-sharing measures; or iii) determined by specific circumstances.

12.8.1.2 Limitation of the coupon and dividend ban

The scope of the coupon and dividend ban is not unlimited. Indeed, there are three limitations of the coupon and dividend ban. Firstly, the coupon and dividend ban does not apply to *newly issued* securities. In that regard, it should be noted that a coupon and dividend ban may compromise the bank's ability to raise fresh capital on the market. The Commission therefore accepts that the coupon and dividend ban does not apply to newly issued securities, provided any payment of coupons on such newly issued capital instruments will not create a legal obligation to make any coupon payments on the bank's existing securities.[163] This is explicitly recognised in point 26 of the Restructuring Communication.[164]

Secondly, the coupon and dividend ban does not apply to securities where the bank has *no discretion* to suspend coupon payment. The case of Ethias is a nice illustration of this limitation. In this case, the Commission noted that the hybrids issued by Ethias were not loss absorbing on a going concern basis. In particular Ethias had no discretion to suspend coupon payment. The possibility of coupons deferral was conditional on the inability of Ethias to meet solvency requirements in view of its annual audited accounts. As this condition has not been fulfilled during the period since the aid measure was announced, Ethias has not had discretion to defer coupon payments on its hybrids. As a result, the criterion of burden sharing does not require Ethias to refrain from payments of coupon payments on its hybrid instruments.[165]

161. Bank of Ireland, N546/2009, 15 July 2010, para. 217.
162. NordLB, SA.34381, 25 July 2012, para. 166.
163. See, for instance: Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 44 and 140.
164. As regards the trade-off between the own contribution of subordinated debt holders on the one hand and the refinancing capability of the bank on the other hand, see footnote 7 to point 26. This footnote refers to points 33, 34 and 45 of the Recapitalisation Communication.
165. Ethias, N256/2009, 20 May 2010, para. 134.

Thirdly, point 26 of the Restructuring Communication provides that a bank should not use State aid to pay compensation for own resources *if there are insufficient profits*. This implies that when a beneficiary bank makes profit, coupon payments may be made again. For example, in the case of LBBW, Germany had committed that financial instruments would only be serviced in the next three years if no appropriation of reserves was necessary for this. The Commission considered that this ensured that compensation for own resources would only be made in the event of sufficient profits and that no State aid would be used for payments to shareholders.[166]

12.8.1.3 Exceptions to the coupon and dividend ban

Exceptionally, the Commission can authorise dividend payments provided the benefits of the dividend payment outweigh the disadvantages of such deviation.[167] If no authorisation is given, the payment would constitute a breach of the dividend ban.

In the case of Caixa Geral de Depositos (CGD), there was a breach of a dividend ban. CGD had committed to a dividend ban. However, on 28 September 2012, Caixa Geral Finance Limited (an affiliate of CGD) had paid out dividends on perpetual non-cumulative preference shares in the amount of EUR 405.415. Portugal argued that these payments were not dividends, but coupon payments which may be paid if there is a legal obligation to do so. However, the Commission did not accept this argument and concluded that the breach of the dividend ban constituted misuse of State aid. Consequently, the Commission opened the formal investigation procedure for misuse of State aid pursuant to Article 16 of the Procedural Regulation. In its decision of 24 July 2013, the Commission held that the aid was not limited to the minimum necessary, because CGD had paid out dividends in the amount of EUR 405.415. Consequently, the aid amount exceeded the minimum necessary by an amount of EUR 405.415. However, CGD committed to pay back to Portugal an amount of EUR 405.415. Because of this commitment, the Commission concluded that the aid was limited to the minimum necessary.[168]

Also in the case of Banco BPI – another Portuguese bank – there was a breach of the dividend ban. In Jun 2012, BPI was recapitalised under the Portuguese recapitalisation scheme in the form of CoCo’s (contingent convertible subordinated bonds). In August 2012, dividends on preference shares issued by

166. Landesbank Baden-Württemberg (LBBW), C17/2009, 15 December 2009, para. 98.
167. BPI, SA.35238, 24 July 2013, para. 84.
168. Caixa Geral de Depósitos (CGD), SA.35062, 24 July 2013, para. 83.

BPI Capital Finance were paid without prior Commission authorisation. The preference shares had some particular features: due to the terms and conditions of the preference shares – namely the guarantee on those shares which prevented any repurchase or redemption of parity obligations or junior obligations until the date on which a fourth consecutive preferred dividend would have been paid in full – BPI would not have been in the position to repurchase the CoCo's (i.e. to pay back the Portuguese State). This was acknowledged by the Commission. Nevertheless, the Commission considered that this element did not alter its assessment that the dividend payment took place in contravention of the dividend ban.[169] However – just like in the case of CGD – the Commission took note of the commitment by BPI to pay back to Portugal an amount equalling the dividend payment (and therefore the amount by which the aid granted exceeded the minimum necessary). Given that commitment, the aid was deemed to have been limited to the minimum necessary.[170]

In the Restructuring Decision on ABN AMRO, a different approach can be found. In this decision, the Commission acknowledged that dividends paid by ABN AMRO Group to the State could trigger hybrid coupons. The Commission considered that "a large dividend hints at restored viability and also helps to keep potential excess capital in check, which helps to limit undue distortions of competition".[171] Therefore, the Commission did not object to the payment of a sizeable dividend to the State even though that payment could trigger hybrid coupon payments.

A similar consideration can be found in the case of ING. ING had made discretionary coupon payments in 2009 without any proper justification although it was loss-making in 2008. The Commission considered that a coupon ban should no longer be required in the case of ING *provided that ING repayed EUR 5 billion to the State* before 31 January 2010. That exemption would include the coupon payments of 8 and 15 December 2009. The Commission clarified this as follows: "The early repayment of a significant part of the State aid granted to the Netherlands addresses existing concerns of the Commission that such coupon payments impede ING from achieving long-term viability without State aid. If a bank is able to raise such a significant amount of capital from the market and has a clear strategy in the medium-term, it should no longer be restricted in the use of its capital if and where this does not threaten the implementation of its restructuring plan".[172]

169. BPI, SA.35238, 24 July 2013, para. 85.
170. BPI, SA.35238, 24 July 2013, para. 87.
171. ABN AMRO, C11/2009, 5 April 2011, footnote 123.
172. ING, C10/2009, 18 November 2009, para. 139. Reprised in: ING, 11 May 2012, para. 196. Also reprised in: Banca Monte dei Paschi di Siena (MPS), SA.36175, 27 November 2013, para. 148.

The case of ING is also interesting in the sense that there was a breach of the call ban. In addition to making discretionary coupon payments, ING had also exercise a call option on a lower Tier 2 bond. [173] With respect to the exercise of the call option, the Commission noted that ING had not informed the Commission of this and had thus not obtained Commission approval. The Commission concluded that ING had violated point 26 of the Restructuring Communication and that these "aggravating circumstances" had to be compensated by additional measures mitigating distortions of competition.[174]

Similarly, Caja Castilla-La Mancha (CCM) had not complied with the Commission's policy on hybrid instruments as stipulated in point 26 of the Restructuring Communication. Firstly, CCM made discretionary coupon payments on hybrid capital in 2009 although it was loss-making in 2008.[175] Secondly, there were two buybacks of preference shares called at par value in July and August 2009.[176] The Commission noted that the coupon payment and the two buybacks did not respect the principle embodied in point 26 and should be compensated by a more in-depth restructuring.[177]

In the same vein, the Commission noted that the payment of coupons in the case of Banco Português de Negócios (BPN) did not respect point 26 of the Restructuring Communication and should be compensated for by a more in-depth restructuring.[178]

The conclusion reached in the cases of CCM and BPN is in line with the observation that was made in section 10.4: a lack of adequate own contribution has to be compensated by far-reaching restructuring.

12.8.2 Concluding remarks

The present section has shown that the modalities of the coupon and dividend ban may differ. Does this amount to an inconsistency? In my opinion, the coupon and dividend ban should not be viewed in isolation. Indeed, the coupon and dividend ban is usually imposed to enhance burden-sharing. In other words: it is usually accompanied by one of the other forms of burden-sharing, such as dilution (in case of shares) or a LME (in case of subordinated debt instruments).

173. ING, C10/2009, 18 November 2009, para. 79.
174. ING, C10/2009, 18 November 2009, para. 138 and 143.
175. Caja Castilla-La Mancha (CCM), NN61/2009, 29 June 2010, para. 24.
176. Caja Castilla-La Mancha (CCM), NN61/2009, 29 June 2010, para. 23.
177. Caja Castilla-La Mancha (CCM), NN61/2009, 29 June 2010, para. 192.
178. Banco Português de Negócios (BPN), SA.26909, 27 March 2012, para. 241-244. The Commission considered that, since BPN was being sold, a ban on calls until 31 December 2016 was necessary to provide a minimum level of burden-sharing from the bank's capital holders.

12.9 Conclusion

In each bank State aid case, the Commission assesses whether the aid amount is limited to the minimum and whether there is sufficient burden-sharing. The characteristics that are relevant to that assessment were identified and discussed in the present chapter. What are the key findings and what are their implications for the Commission on the one hand and the Member States and beneficiary banks on the other hand?

12.9.1 Key findings

Not all bank State aid cases are characterised by the same type of burden-sharing, nor are they characterised by the same level of burden-sharing. Indeed, as section 12.6 has shown, the subordinated creditors in some cases only faced a coupon ban, while in other cases, the subordinated debt was completely written-down. Does this amount to an inconsistency?

In my opinion, it does not amount to an inconsistency. In that regard, it should be recalled that an evolving policy does not mean that the principle of equal treatment is violated. As explained in section 6.7.3, I am of the opinion that the principle of equal treatment allows for policy changes. One of the most prominent policy changes was the adoption of the 2013 Banking Communication. This Communication established clear burden-sharing standards. In the 2013 Banking Communication, the Commission explicitly referred to the level playing field. The Commission recognised that the absence of ex ante thresholds for burden-sharing had resulted in "diverging approaches to burden-sharing across Member States" and that this would risk undermining the level playing field. For that reason, the Commission decided to raise the minimum requirements for burden-sharing. Thus, the 2013 Banking Communication has contributed greatly to a consistent application of the burden-sharing principle. From that viewpoint, I welcome the adoption of the 2013 Banking Communication.

12.9.2 Implications for the Member States

There may be instances in which Member States wish to avoid burden-sharing by certain investors. Italy is the prime example in that regard. The Italian bank Monte dei Paschi di Siena (MPS) experienced serious difficulties. A resolution of MPS would likely entail bail-in of junior and senior creditors.[179] Since many creditors of Italian banks were families and small investors rather than professional investors, Italy wanted to avoid a bail-in of these investors. The wish to

179. IMF 2016 Article IV Report, p. 25.

avoid a bail-in is driven by political reasons. In that regard, many newspapers refer to the pensioner who committed suicide after he had lost most of his savings, because the subordinated debt of Banca Etruria was 'bailed in'.[180]

Can Member States avoid burden-sharing by certain investors? State aid to an ailing bank will usually trigger the resolution of that bank. Consequently, the State aid control framework and the recovery and resolution framework both apply to these cases. Since the BRRD requires a bail-in (of at least 8%), the burden-sharing requirement of the 2013 Banking Communication is automatically fulfilled.

However, as explained in Chapter 4 of this PhD-study, the BRRD does not apply to all bank State aid cases. Indeed, there are three exceptions in which State aid does not trigger the resolution of the beneficiary bank. Nonetheless, the State aid control framework still applies to these cases. Under the State aid control framework (and in particular under the 2013 Banking Communication) burden-sharing by shareholders and subordinated creditors is – in principle – always required. The words "in principle" indicate that there is room for exceptions to the burden-sharing requirement. Indeed, point 45 the 2013 Banking Communication provides that in exceptional circumstances, no burden-sharing measure is required by the Commission.

In addition, as the CJEU held in case C-526/14 (Kotnik), "the adoption of a communication such as the Banking Communication does not […] relieve the Commission of its obligation to examine the specific exceptional circumstances relied on by a Member State, in a particular case, for the purpose of requesting *the direct application of Article 107(3)(b) TFEU*, and to provide reasons for its refusal to grant such a request".[181] As the AG already rightfully pointed out in his Opinion in case C-526/14 (Kotnik), burden-sharing does not appear in the wording of Article 107(3)(b) TFEU.[182] Thus, when State aid is directly assessed under Art. 107(3) TFEU (and thus outside the 2013 Banking Communication), burden-sharing might be avoided. While this may be theoretically true, it should

180. In 2015, four small Italian banks (Banca Marche, Banca Etruria, Carife and Carichieti) were put in resolution. These four banks had a combined market share of 1%. As part of the resolution, four temporary bridge banks were created. All assets and some liabilities were transferred to these bridge banks. Importantly, the equity and subordinated debt remained at the 'old' bank. This constituted an own contribution by the shareholders and subordinated debt holders.
181. C-526/14, point 41. The legal status of the Communications was discussed in section 3.4.3.
182. Opinion in case C-526/14, point 48.

be recalled that since the adoption of the Crisis Framework, all bank State aid cases were assessed on the basis of the Crisis Communications. In my view, the Commission is not likely to assess bank State aid outside the 2013 Banking Communication.[183] Thus, in my opinion, the 2013 Banking Communication should be considered as the decisive assessment framework.

To conclude, Member States cannot easily avoid the burden-sharing requirement.

12.9.3 Implications for the Commission

While there were diverging approaches to burden-sharing across Member States, the 2013 Banking Communication put an end to this. Thus, by adopting the 2013 Banking Communication, the Commission has taken an important step towards a consistent application of the burden-sharing principle.

183. Babis (2016) has the same view.

Chapter 13. Limiting competition distortions

13.1 Introduction

The problematic aspect of State aid is that it may create distortions of competition. For this reason, the restructuring plan should contain compensatory measures (i.e. measures to compensate for the distortions of competition) – this is the third (and final) pillar of the restructuring plan. In the context of this pillar, the Commission assesses whether the compensatory measures are sufficient to mitigate the competition distortions. The characteristics relevant to that assessment will be explored in the present chapter.

13.1.1 The need for compensatory measures

As was explained in chapter 2, distortions of competition can occur in several ways. Firstly, State aid gives the beneficiary banks an unfair competitive advantage over other banks which did not get State aid. Secondly, State aid may lead to subsidy races between Member States. Thirdly, if a Member State recapitalises banks which do otherwise not have access to capital (and would subsequently have to leave the market), then State aid can frustrate the normal market functioning. In addition, there is the concern of moral hazard: if banks know or expect that they will be rescued, then they are more inclined to take excessive risks. To compensate for those competition distortions, *compensatory measures* are needed.

With respect to the need for compensatory measures, it is worthwhile to recall that if a bank is rescued by means of State aid, rival banks usually benefit from this. By contrast, if the fall of a non-financial firm results in its exit from the market, then this is usually beneficial to its competitors. For financial firms – and especially banks – this is different. Since the banking system is highly interconnected, the fall of one bank might trigger the fall of other banks. Furthermore, the fall of one bank might lead to a loss of confidence in the banking sector as a whole. By creating stability on the financial markets, the rescue of a bank is thus beneficial to rival banks.[1] In the literature, the question was raised whether compensatory measures in favour of competitors were needed.[2]

This illustrates that the precise competitive impact of State aid to banks is not crystal clear. Since the need for compensatory measures depends on the (extent and existence of) competition distortions, a thorough analysis to the competition distortions seems warranted. In that regard, it has been remarked that "the Commission has repeatedly refrained from checking whether a distortion of competition was present".[3]

At this point, it has to be stressed that the Restructuring Communication gives some valuable guidance as to the compensatory measures. Points 28 to 45 of the Restructuring Communication concern the third pillar of the restructuring plan (i.e. measures to limit distortions of competition). Of particular relevance is point 30, which stresses that the measures to limit the distortions of competition should be tailor-made. In that regard, point 30 of the Restructuring Communication stipulates that the nature and form of the compensatory measures depends on two criteria.[4] The first criterion is *the amount of State aid* and the conditions and circumstances under which the State aid was granted. The second criterion concerns *the characteristics of the market(s)* on which the beneficiary bank operates.

Point 30 of the Restructuring Communication suggests that the competitive impact of the State aid will be assessed by the Commission. Many Commission decisions refer to point 30 of the Restructuring Communication. However, the mere reference to point 30 does not mean that the analysis of the competitive impact of the State aid is actually carried out. Does the Commission assume competition distortions or does it really analyse whether they exist? And on the basis of which characteristics? This will be the focus of the current chapter.[5]

1. This is observed by many scholars. See, for instance: Ahlborn & Piccinin 2010a, p. 58. See also: Adler, Kavanagh & Ugryumov 2010, p. 69.
2. Lyons & Zhu 2012: "If rivals benefit from the preservation of the financial system, they do not need a further benefit at the expense of consumers." and "The collapse of a systemic bank would have negative externalities on its rivals, and there is no justification for measures that further benefit rivals by suppressing competition (e.g. requiring high prices or low volumes of activity)."
3. Zimmer & Blaschczok 2011.
4. These two criteria are elaborated in points 31 and 32.
5. NB: one of the factors consistently taken into account by the Commission in its assessment of the competitive impact of the aid is the remuneration that the beneficiary bank has to

13.1.2 The relevant context

Account should be taken of the relevant context. This PhD-study distinguishes between the C-context, the W-context, the T-context and the S/T/W-context. The defining feature of the C-context is that the beneficiary bank continues to exist as a standalone entity. In the other contexts, the beneficiary bank is taken-over by another bank (T-context), split-up (S-context) or wound-down (W-context). In these contexts, the bank disappears as a standalone entity. This is a highly relevant aspect of these contexts. The Commission decisions in these cases usually start the assessment of the competition distortions with the following consideration:

> "The exit of a failed entity which engaged in excessive risk-taking is a clear indication that moral hazard is addressed, in that commercial failure results in liquidation. As a result, the distortion of competition resulting from the State aid is greatly reduced".[6]

This recital clearly illustrates that the disappearance of the bank as a standalone entity is relevant from the viewpoint of addressing moral hazard. In addition, the exit of the bank means that the beneficiary bank as such will disappear from the market. As a result, the beneficiary bank as such will no longer distort competition. With respect to the beneficiary bank's activities, it is possible that some of these activities are transferred to another bank. This is done through an open and transparent tender. In that regard, the Commission usually notes as follows:

> "The sale of the Bank, as the beneficiary of the aid, to another market player in the framework of an open sales process constitutes a form of mitigation of potential distortions of competition. This process, which gives potentially harmed competitors the possibility to assume this business, resembles to some extent the "counterfactual" situation that would have occurred in the absence of State aid, as a company in difficulty (or indeed in bankruptcy) will

pay to the State. The Commission has held that an adequate remuneration contributes to limiting the distortion of competition resulting from the aid. This is thus a relevant characteristic. However, since this characteristic was already discussed extensively in section 8.6, it will not be discussed further in the present chapter.

6. This recital appeared in, inter alia: Dunfermline, NN19/2009, 25 January 2010, para. 125; Bradford&Bingley, N194/2009, 25 January 2010, para. 56.

> normally often seek a potential buyer in the market or, failing to do so, would be liquidated. As a result, the sale/resolution process in the present case contributes significantly to limiting the distortions of competition resulting from the aid".[7]

To some extent, the fact that the bank disappears as a standalone entity is a relevant characteristic. This is clearly illustrated by the aforementioned recitals. However, it is not listed as a relevant characteristic, because it is inherent to the context. Indeed, every beneficiary bank in the T-context, W-context or S-context disappears as a standalone entity. By contrast, a bank in the C-context is – by definition – not a bank that disappears as a standalone entity.

13.1.3 Structure of this chapter

In the context of the third pillar, the Commission assesses whether the compensatory measures are sufficient to mitigate the competition distortions stemming from the State aid. Whether the compensatory measures are sufficient to mitigate the competition distortions depends essentially on two aspects. Firstly, it depends on the type and nature of the compensatory measures. Secondly, it depends on the competitive impact of the State aid (in other words: the need for compensatory measures).

For this reason, the present chapter is divided into two parts. Part I discusses the characteristics that are relevant to the assessment of the need for compensatory measures, while Part II discusses the various compensatory measures. In particular, the following compensatory measures will be discussed: market-opening measures (see section 13.4), divestments (see section 13.5), balance sheet reduction and other forms of downsizing (see sections 13.6 and 13.7), growth limitation (see section 13.8), acquisition ban (see section 13.9), price leadership ban and other pricing restrictions (see section 13.10), ban on aggressive commercial practices (see section 13.11) and exit from State aid (see section 13.12). These compensatory measures can be considered as relevant characteristics. For instance, the fact that the bank is subject to a price leadership ban contributes to the conclusion that the distortions of competition are sufficiently addressed.

7. This recital appeared in, inter alia: Catalunya Banc, SA.33735, 28 November 2012, para. 187; Novacaixagalicia (NCG) Banco, SA.33734, 28 November 2012, para. 186; Banco CEISS, SA.34536, 20 December 2012, para. 166.

Part I: Competitive impact

13.2 Competitive impact: amount of State aid

* *The fact that the aid amount is very large. / The fact that the aid amount is relatively low.*

13.2.1 Why is this a relevant characteristic?

One of the most influential factors determining the extent of the compensatory measures is the amount of State aid. The aid amount is often expressed in terms of the bank's risk-weighted assets (RWA). As a general rule, the higher the aid amount (in terms of RWA), the higher the need for compensatory measures. This general rule can be illustrated by the following recital of the Commission decision on the Spanish banking group BFA[8]:

> "The aid amount granted is equivalent to [20-30]% of the BFA Group's RWA as of 31 December 2011. As the relative amount of aid to the beneficiary is very large, significant measures are necessary in order to limit potential distortions of competition".[9]

Conversely, if the aid amount is low, then there is less need for compensatory measures. This can also be illustrated by a recital of a Commission decision:

> "The Commission recalls that CGD[10] has received State aid in the form of capital injections and CoCos in the amount of EUR 1 650 million. The aid amount is equivalent to 2.3% of CGD's Risk Weighted Assets (RWA) which is comparatively low. As the CoCos are adequately remunerated, only moderate measures are necessary to limit potential distortions of competition".[11]

These considerations can be found in many decisions. The aid amount (in terms of RWA) is thus clearly a decisive factor, which makes the fact *that the aid amount is very large* and the fact *that the aid amount is relatively low* relevant characteristics.

The underlying reasoning is as follows: the larger the aid amount, the larger the distortions of competition, and the greater the need for compensatory measures. This reasoning shows that there is an intermediate step between the

8. Banco Financiero y de Ahorro (BFA) and its banking subsidiary Bankia.
9. BFA, SA.35253, 28 November 2012, para. 205.
10. Caixa Geral de Depósitos (CGD) is a Portuguese banking group.
11. CGD, SA.35062, 24 July 2013, para. 89.

aid amount and the need for compensatory measures (i.e. the competitive impact or distortive effect of the State aid). However, this intermediate step is usually not mentioned explicitly in the decisions.[12] The emphasis is on the amount of State aid rather than on the competitive impact of State aid. The decisions create the impression of a direct link between the amount of State aid and the need for compensatory measures, as is illustrated by the above-cited consideration of the BFA-decision.

It should also be noted that these relevant characteristics are not mentioned in relation to a specific compensatory measure, but usually in relation to compensatory measures in general.[13] However, in some cases, a relation between the aid intensity and the balance sheet reduction seems to be implied. This will be discussed in more detail in section 13.6.3.

13.2.2 Has the Commission consistently taken into account this relevant characteristic?

In almost any Commission decision, the aid amount is indicated.[14] However, in some decisions, the amount of aid is only mentioned in the context of the existence of State aid, rather than in relation to the need for compensatory measures. For instance, the decision on IL&P[15] indicates that the recapitalisation constituted nearly 18% of the bank's RWA, but the Commission did not refer to the aid amount when it assessed the measures limiting the distortions of competition.[16] Thus, in some cases, the (relative) amount of aid is not *explicitly* used as an assessment criterion. However, the fact that in those cases, the aid amount is not used to *substantiate* the need for compensatory measures does not preclude the fact that it may have been used to *assess* the need for compensatory measures. And given the fact that the aid amount is – also intuitively – a very important assessment criterion, it is likely that the Commission has used this criterion in every case.

12. The term "competitive impact" is used by the Commission in its decision on LCCU, para. 64 and 69. See also the Opening Decision in Anglo. The term "distortive effects of aid" is used in SachsenLB, WestLB, IKB, HRE (24 July 2009, para. 64), BayernLB (12 May 2009, para. 93). A large aid amount reflects the size of failure of the bank in question, as the Commission put it in the decision on Anglo/INBS (29 June 2011, para. 173).
13. This means that a direct relation between aid intensity and balance sheet reduction cannot be established. See chapter 6.
14. See the table in Annex XII. The fourth column of this table indicates for each bank State aid case whether the Restructuring Decision mentions the aid amount.
15. Irish Life & Permanent Group Holdings (IL&P) is nowadays called 'Permanent TSB'.
16. IL&P, SA.33442, 9 April 2015, para. 60.

13.2.3 How is this relevant characteristic elaborated in the decisions?

It should be recalled that the amount of aid can be measured in absolute terms as well as in relative terms. In the latter case, it is measured as a percentage of the bank's RWA (i.e. Risk Weighted Assets). It should also be recalled that many bank State aid cases are characterised by various State aid measures. All this means that the amount of aid can figure in three ways in the Commission decisions: the *absolute* amount of aid; the *relative* amount of aid; and the *total* amount of aid (in case the bank has benefited from more than one aid measure).

The absolute amount of aid

Sometimes, the exact amount of aid is difficult to establish. For instance, the aid amount of asset relief measures has to be calculated. The quantification of the aid element in an asset relief measure was discussed in chapter 9.

Also the quantification of the aid amount of recapitalisations is not always straightforward. The case of Lloyds Banking Group (LBG) is a good illustration of this. The Commission first recalled that the aid amount of a capital injection normally equals the nominal value of the recapitalisation. The Commission then referred to the specific circumstances of the case: namely the concrete features of the Seaview transaction (clear indication by investment banks of their readiness to underwrite the whole issue independent of the State's participation; State's participation on pari passu terms with private investors). Consequently, the distortive effect of the recapitalisation was more limited than in normal recapitalisations of companies in financial difficulties.[17]

With respect to the aid amount of a guarantee, it is established practice that "as for companies in financial difficulty, if a bank is not able to raise sufficient non-guaranteed debt to cover all its funding needs, the aid element of such guarantees might go up to the level of their nominal value".[18]

The total amount of aid

When a bank has benefited from various State aid measures, then the total amount of aid has to be established. However, not all the aid amounts can be added up: "The Commission recognises that it is not relevant to add together the amounts of aid corresponding to recapitalisation with guarantees of liabilities

17. Lloyds Banking Group (LBG), N428/2009, 18 November 2009, para. 178.
18. Bank of Ireland, N546/2009, 15 July 2010, para. 175. See also: Dexia, C9/2009, 26 February 2010, para. 144-145; ING, 18 November 2009, para. 104; SachsenLB, 4 June 2008, para. 80. This principle is also enshrined in point 4.1a of the 'Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees'.

as the two types of measures do not have the same effects of distortion of competition".[19] The aid amount of guarantees is thus not taken into account for the calculation of the amount of aid relative to the bank's RWA in order to establish whether an in-depth restructuring is necessary.[20]

The relative amount of aid

The aid amount of impaired asset measures and of capital injections are often expressed in terms of the bank's RWA.[21] Usually, there are no problems in establishing the bank's RWA. However, in the case of Alpha Bank, the following question arose. The aid measures were granted over the course of a one-year period (from April 2012 until May 2013). During that period, the RWA of Alpha Bank increased substantially (as a result of the acquisition of Emporiki Bank). The question was therefore whether the RWA at the beginning of that period or the RWA at the end of that period should be used (for the calculation of the relative amount of aid). The Commission considered that "the fact that the Bank acquired Emporiki Bank, well after March 2012, should not lead to a reduction of the ratio "aid to RWA". Indeed, the aid is not less distortive because the Bank made an acquisition which increases its RWA".[22]

13.2.4 Concluding remarks

In its decisional practice, the Commission has consistently taken into account the (relative) amount of State aid (see subsection 13.2.2). This is in line with point 31 of the Restructuring Communication which clearly establishes that the amount of State aid is an assessment criterion.[23]

19. Dexia, C9/2009, 26 February 2010, para. 150.
20. Bank of Ireland, N546/2009, 15 July 2010, para. 175. See also: HSH Nordbank, SA.29338, 20 September 2011, para. 215.
21. NB: It should be noted that the aid element of a guarantee is never expressed in terms of RWA.
22. Alpha Bank, SA.34823, 9 July 2014, para. 181.
23. As was discussed in section 10.2, the aid intensity was used as an indicator for the soundness of the bank: if the aid was above 2% of the beneficiary bank's RWA, then the bank was considered to be distressed, and consequently, a restructuring plan had to be submitted. The 2%-threshold lost its relevance after the First Prolongation Communication. Nevertheless, the aid intensity remained very relevant, since it was not only used as an indicator for the soundness of the bank; as is explained in the present section, the relative aid amount is also used as an indicator of the need for compensatory measures.

13.3 Competitive impact: market position of the beneficiary bank

** The fact that the bank is one of the market leaders./The fact that the beneficiary bank has a limited market presence.*

** The fact that the market is concentrated./The fact that the market is fragmented.*

13.3.1 Why are these characteristics relevant?

As a general rule, if the competitive impact of the State aid is low, then there is less need for compensatory measures. Point 32 of the Restructuring Communication stipulates that the compensatory measures will be tailored to market characteristics (such as: concentration levels, capacity constraints, and the level of profitability, barriers to entry and to expansion). When analysing the likely effects of State aid, the Commission takes into account the size and importance of the beneficiary bank.

The market position of the beneficiary bank can be measured by its market presence (in terms of market share). The fact that the beneficiary bank has a limited market presence can be considered as a relevant characteristic, because it is used as an indication that the distortions of competition are limited. Consequently, the need for compensatory measures is reduced. By contrast, the fact that the beneficiary bank is one of the market leaders underlines the need for compensatory measures.

13.3.2 Has the Commission consistently taken into account these relevant characteristics?

Consider the following recital from the decision on SNS REAAL:

> "SNS REAAL is an important player on the Dutch banking and insurance market. Until 2004, SNS Bank's market share in mortgages (new production) ranged between 5 and 8%. Between 2004 and 2008, it increased to 10%, but then from 2008 to 2011 it decreased to approximately 5% before dropping still further to 2% in 2012. The market share in savings (volumes) was approximately 10% in 2012. In the market segment of individual life, REAAL Insurance had a market share of 18.3% (2012) and held the third-largest book12. In the market segment of group life, the corresponding figures are a market share of 10.9% (2012) and the fifth-largest book. In the property and casualty market ("P&C"), REAAL is the eighth-largest player with a market share of around 5%".[24]

24. SNS REAAL, SA.36598, 19 December 2013, para. 10.

This is a recital from the 2013 Restructuring Decision on SNS REAAL. Note that the market position is mentioned and elaborated. However, this recital is not mentioned in the assessment-part of the decision, but in the description-part. Thus, the market position is only mentioned as a description of the beneficiary bank; it is *not mentioned as an indication of the competitive impact* of the State aid. The market position is thus not really used as an assessment criterion. SNS REAAL is not the only decision that does not explicitly use the market position as an assessment criterion. In fact, in several decisions, the Commission did not explicitly take into account the market characteristics in its assessment of the competitive impact of the aid.

It should be pointed out that many cases contain the commitment that the beneficiary bank will reduce its market presence. This is also a relevant characteristic – as will be explained in sections 13.6 and 13.7. However, it should be stressed that it is not the same relevant characteristic as the one discussed in the current section. The fact that the bank has a limited market presence is relevant, because it gives information on the competition distortions. The fact that the bank will reduce its market presence is relevant, because it is a compensatory measure; it is a solution to the competition distortions.

To conclude, in some decisions, market presence is not mentioned as an indication of the competitive impact. Why do not all cases mention whether the bank has a limited or large market presence? In many cases, the need for compensatory measures follows from the fact that the banks have received State aid, without taking into account the market position of the beneficiary bank. Distortions of competition are thus inferred from the very fact that banks received State aid. But why do some cases mention the market position of the bank, while other decisions do not? A possible explanation could be that the fact that the bank has a limited market presence is a *mitigating circumstance*. A large market share would amount to an *aggravating circumstance*. A normal market share would be a neutral factor. It could therefore be argued that the market presence should only be mentioned if it constitutes a mitigating or aggravating circumstance.

13.3.3 How are these relevant characteristics elaborated in the decisions?

The following recitals from the decision on Kommunalkredit Austria (KA) can serve as an illustration of how the Commission takes into account the market characteristics:

> "Regarding the size and the relative importance of the bank on its market (*para. 32 Restructuring Communication*), the Commission notes that KA was a *relatively small market player*, *both in absolute and in relative terms*, and on its *domestic market as well as abroad*. Also, the bank is focused only on public and infrastructure finance".[25]

> "As regard the characteristics of the market on which KA operates, the Commission notes that the structure of the public finance and the project finance market both in Austria and in Europe remains *relatively fragmented*. Given the small size of KA Neu and its limited market share on its domestic market, let alone on the European market and on each national market on which it intends to be present, the Commission deems the likely effects on both the public finance and project finance markets *to be rather limited*".[26] [Italics mine, *REvL*]

Several observations can be made on the basis of the above-mentioned recitals. *Firstly*, the Commission explicitly refers to point 32 of the Restructuring Communication, which provides that the nature and form of compensatory measures depend on the characteristics of the markets on which the beneficiary bank will operate. *Secondly*, a link was made between the market characteristics and the competitive impact of the aid. *Thirdly*, the Commission identified the relevant market (i.e. public finance and project finance). In addition, the Commission made a distinction between the national market and the European market. Furthermore, the Commission also mentioned that the relevant market was relatively fragmented.

To what extent is the above-mentioned recital of the decision on KA illustrative of the Commission's approach with respect to the market characteristics? This PhD-study has analysed all the Commission decisions to find out how the market position of the beneficiary bank has been taken into account by the Commission. This analysis yields the following results:

With respect to the first observation: point 32 of the Restructuring Communication

It should be noted that the Commission does not always refer in every decision to point 32 of the Restructuring Communication. This is, however, not significant. The crucial question is not whether the Commission refers to point 32; instead the crucial question is whether the Commission *actually applies* point 32.

25. Kommunalkredit Austria (KA), SA.32745, 31 March 2011, para. 95.
26. Kommunalkredit Austria (KA), SA.32745, 31 March 2011, para. 104.

With respect to the second observation: competitive impact

It should be noted that in several decisions, a link was explicitly made between the market presence of the beneficiary bank and the competitive impact of the State aid (and the subsequent need for compensatory measures). For instance, in the decision on the Lithuanian Central Credit Union (LCCU), the Commission considered that, since LCCU had a limited market presence, the competitive impact of the State aid was limited and that there was thus less need for compensatory measures.[27]

Conversely, in some decisions, the Commission held that the beneficiary bank was one of the market leaders. To give an example, in the decision on RBS, the Commission considered that the *aid allowed the bank to keep its leading position*.[28] Consequently, measures were necessary in order to remedy this distortion of competition created by the aid.

The link between the market position of the bank and the need for compensatory measures explains the relevance of the market position. In that regard, it should be noted that this link is not always made explicit in every decision. Indeed, subsection 13.3.2 discussed that there are decisions that do not mention the market position of the beneficiary banks in relation to the competitive impact of the aid (or in relation to the need for compensatory measures).

With respect to the third observation: market characteristics

The decision on KA is one of the decisions that really elaborates the market characteristics. The market characteristics can be elaborated on the basis of the following aspects: i) the identification of the relevant product market, ii) the identification of the relevant geographic market, iii) the concentration level of the market, and iv) other market characteristics, such as entry barriers and switching costs.

As regards the first aspect, it should be noted that the bank State aid decisions do not give much information on the identification of the *relevant product market*. This stands in sharp contrast to the detailed analysis of the relevant product market in one of the other fields of EU competition law: merger control.[29]

In the decision on KA, the Commission made a distinction between the national market and the European market. The relevance of the *geographic market* also appears in some other decisions. For instance, Bank of Ireland was one of the market leaders in Ireland. But Bank of Ireland had only a limited market

27. Lithuanian Central Credit Union (LCCU), SA.34208, 26 September 2012, para. 69.
28. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 241.
29. See also: J. Fingleton, F. Ruane and V. Ryan, 'Market Definition and State aid Control', 1999.

share in the UK. The run-off of the UK loan portfolios was therefore sufficient to address competition distortions. This illustrates the importance of how the relevant geographical market is defined. In the decision on Dunfermline, a distinction was made between the UK market and part of that market (i.e. the market in Scotland). In some decisions, the Commission took into account the fact that the beneficiary bank mainly operated regionally. This was the case with several Danish banks[30] and Spanish banks. For instance, the Commission noted that Banco CAM had a limited market presence in the national market, but a very strong regional presence.[31] Notwithstanding the fact that the relevant geographic market is mentioned quite prominently in these decisions, there are many decisions that do not clearly identify the relevant geographic market.

Besides market presence, there are other market characteristics. One of them is the fact *that the market is concentrated*. Indeed, in several decisions, the Commission mentioned that the relevant market was concentrated. Conversely, in the decision on KA, the Commission mentioned that the relevant market was fragmented. An interesting observation is that the fact that the market is concentrated is often[32] mentioned in combination with the fact that the beneficiary bank is one of the leading market players.[33] Another observation is that only a few decisions mention whether the relevant market is concentrated or fragmented.

The other market characteristics identified in point 32 of the Restructuring Communication, such as *switching rates and entry barriers*, are usually not mentioned in the decisions.[34] It can be concluded that in many decisions, the analysis of the market characteristics is limited to an analysis of the market shares of the bank.

30. Fionia Bank, N560/2009, 25 October 2010, para. 85.
31. Banco CAM, SA.34255, 30 May 2012, para. 166.
32. See the decisions on ING, LBG and RBS.
33. See, for instance, the following recital from the decision on ING: "The Commission has identified such market conditions in particular in the Netherlands where the retail banking market is highly concentrated and ING is one of the leading players able to maintain its high market share with the help of State aid." (ING, C10/2009, 18 November 2009, para. 144).
34. The decision on RBS (N422/2009, 14 December 2009, para. 241) is one of the few decisions that mentions switching rates. The decision on Dexia (C9/2009, 26 February 2010, para. 210) is one of the few decisions that mentions entry barriers.

13.3.4 Concluding remarks

An inconsistency can occur at two levels. In the first place, there is an inconsistency when the Commission does not always apply the market position of the bank as a criterion to assess the competitive impact of the aid. In the second place, there is an inconsistency when the Commission does not elaborate the market position in a consistent manner.

As regards the first level, subsection 13.3.2 set out that almost all decisions mention the market position of the beneficiary bank. In that regard, a distinction should be made between the decisions that mention the market position as a *description* of the beneficiary bank and the decisions that mention the market position as a *criterion* to assess the competitive impact of the aid. Only the latter decisions can be categorised as decisions in which the Commission took into account the market position in its assessment. The finding that the market position is not always used as an assessment criterion points at an inconsistency.

As regards the second level, subsection 13.3.3 set out that the market characteristics are not always elaborated to the same extent. Some decisions contain more detailed information than other decisions.

Thus, the main finding is that at both levels, there is an inconsistency. What are the implications of this finding? It might be useful to recall that in its Restructuring Communication, the Commission provides that the compensatory measures will be "tailored to market characteristics".[35] In my opinion, the Commission should 'practice what it preaches' and should thus take into account the market characteristics in its assessment of the compensatory measures.

35. Point 32 of the Restructuring Communication.

Part II: Compensatory measures

13.4 Market-opening measures

* *The fact that the beneficiary bank will implement market-opening measures.*

13.4.1 Why is this a relevant characteristic?

Beneficiary banks should take compensatory measures (i.e. measures to compensate for the competition distortions). There are different types of compensatory measures. Market-opening measures are a type of compensatory measure. The fact that the beneficiary bank will implement market-opening measures is thus a relevant characteristic.

The relevance of market-opening measures is also recognised in the Restructuring Communication. Point 33 of the Restructuring Communication stresses that the Commission will view positively measures that help to ensure that national markets remain *open* and *contestable*. An open and contestable market means that potential competitors can easily enter the market. Such markets are characterised by low entry barriers.

13.4.2 Has the Commission consistently taken into account this relevant characteristic?

The analysis of the decisional practice reveals that there are not many cases that are characterised by market-opening measures. In fact, these measures can only be found in the cases of the Irish banks.[36]

In Ireland, seven financial institutions received State aid (Bank of Ireland, Anglo/INBS, AIB/EBS, Quinn Insurance, IL&P), while only the restructuring plans of Bank of Ireland, AIB/EBS and IL&P contained market-opening measures. There are no market-opening measures in the cases of Anglo/INBS and Quinn Insurance. This could be explained by the fact that Bank of Ireland, AIB/EBS and IL&P continued their economic activities (i.e. C-context), whereas Anglo/INBS and Quinn Insurance were wound-down (i.e. W-context).

It should be pointed out that market-opening measures only appear in the cases on the Irish banks. Perhaps this can be explained by the fact that beneficiary banks in other Member States committed to reduce their activities in

36. In that regard, Franchoo, Baeten & Solek (2015, p. 613) remark that – apart from Ireland – the Member States have been "less than creative".

their home market, while the Irish banks benefiting from State aid did not reduce their activities in Ireland. The balance sheet reductions in the case of Bank of Ireland concerned mainly the UK and international markets.[37]

13.4.3 How is this relevant characteristic elaborated in the decisions?

The restructuring plan of Bank of Ireland[38], of AIB/EBS[39] and of IL&P[40] provided for two market-opening measures. These banks would offer a so-called Service Package[41] and a Customer Mobility Package[42] to new entrants or to small[43] banks already active in Ireland.

In addition to the market-opening measures undertaken by the beneficiary banks, the Irish State committed to take several measures to improve competition on the Irish markets.[44] For instance, the Irish State committed to enhance customer mobility. These commitments were noted positively by the Commission.

All these measures stimulate new entry on the Irish banking market and hence limit the distortions of competition caused by the State aid. These measures were especially important in the Irish markets, because the Irish banking market was seriously affected by the financial crisis. As a result of the crisis, Irish banks reduced their balance sheets and some even retrenched from the market.[45]

37. Bank of Ireland, SA.33443, 20 December 2011, para. 179. See also para. 175: "There is still no sign that foreign competitors, whether incumbent or new, are willing to increase their presence in the Irish market in the short-term. When assessing the measures addressing distortion of competition associated to the restructuring of Bank of Ireland, the Commission has therefore to take into consideration the lack of potential investors on the short-term, and the retrenching of several foreign banks from Ireland."
38. Bank of Ireland, N546/2009, 15 July 2010, para. 254.
39. AIB/EBS, SA.29786, 7 May 2014, para. 127-130.
40. IL&P, SA.33442, 9 April 2015, para. 92.
41. The Service Package was aimed at reducing the cost of entry or the cost of expansion, because the services have to be offered on fair, reasonable and non-discriminatory terms. It is specified that the services are provided at incremental costs.
42. The Customer Mobility Package was aimed at reducing the costs of customer acquisition. Pursuant to the Customer Mobility Package, competitors may contact the customers of Bank of Ireland, AIB/EBS and IL&P and present them with alternative products for their current accounts or their credit card products. The Commission noted that this customer approach was more targeted and less costly than general advertising measures.
43. 'Small' was defined as a market share below 15%. See: Bank of Ireland, N546/2009, 15 July 2010, para. 137.
44. Bank of Ireland, N546/2009, 15 July 2010, para. 257-274; Bank of Ireland, SA.33443, 20 December 2011, para. 192.
45. Bank of Ireland, N546/2009, 15 July 2010, para. 245.

13.4.4 Concluding remarks

Compensatory measures are needed in every bank State aid case. Nevertheless, the total package of compensatory measures does not have to be the same in each case. This is clearly illustrated by the fact that market-opening measures only appear in a few cases. It is thus not a very common compensatory measure.

13.5 Divestments: creation of a new competitor

* *The fact that the divestment is aimed at creating a new competitor.*

13.5.1 Why is this a relevant characteristic?

(Almost) all restructuring plans contain structural remedies, such as divestments. Restructuring plans are aimed at three pillars, and this is reflected by the fact that divestments can have three different purposes. Sometimes, banks are required to divest certain loss-making activities or activities that are no longer part of their core business. These divestments are aimed at restoring viability (i.e. the first pillar). In section 12.3, it was explained that divestments of profitable non-core subsidiaries constitute an own contribution of the bank (i.e. the second pillar). Divestments can also be aimed at increasing competition on the market (i.e. the third pillar). Those divestments are discussed in the present section.

Some divestments are specifically aimed at increasing competition on the market *by introducing a challenger or by reinforcing a small existing player.* To give an example: the restructuring plan of ING envisaged a large number of divestments.[46] One of these divestments consisted of the carve-out of WUH/Interadvies.[47] The decision on ING specified that this carved-out new company should be a viable standalone player on the Dutch retail banking market.[48] In other words: this divestment was aimed at creating a new competitor on the Dutch banking market.

46. ING, C10/2009, 18 November 2009, para. 57.
47. ING, C10/2009, 18 November 2009, para. 55 and 85. WUH/Interadvies was an ING business unit under the umbrella of Nationale Nederlanden Insurance unit and comprised Westland Utrecht Hypotheekbank, Westland Utrecht Effectenbank and Nationale Nederlanden Hypotheekbedrijf, Nationale Nederlanden Financiele Diensten.
48. ING, C10/2009, 18 November 2009, para. 85.

13.5.2 Has the Commission consistently taken into account this relevant characteristic?

A key observation is that although many bank State aid cases are characterised by divestments, only in a few cases, the divestment is specifically aimed at creating a new competitor. Indeed, only in the cases of KBC, ING, LBG, RBS, Ethias, Bank of Ireland and Parex banka, the divestments were aimed at creating a new competitor.[49]

How can the absence of the relevant characteristic in so many cases be explained? One feature that the Restructuring Decisions on KBC, ING, LBG, RBS, Ethias, Bank of Ireland and Parex banka have in common is that they were all adopted in 2009 and 2010. Decisions that were adopted in later years do not include this type of divestment. This could indicate a change of approach. This, in turn, could explain why this type of divestment does not figure in every restructuring decision. It should, however, be remarked that the Commission never explicitly recognised a change of approach with respect to this type of divestment.

While there may be valid reasons to change the approach towards this specific type of divestment, changing the approach without a clear explanation points at an inconsistency.

13.5.3 How is this relevant characteristic elaborated in the decisions?

Several observations can be made. First of all, the Commission usually refers to the *market characteristics*. For instance, in the decision on ING, the Commission considered that the carve-out of WUH/Interadvies should be able to add competition in the highly concentrated retail banking market in the Netherlands. The Commission also took into account the fact that ING was one of the market leaders.[50] These two market characteristics reinforce the need for compensatory measures such as the divestment.

Second, the divestment business should constitute an *attractive target*. For instance, in the decision on the Belgian bank KBC, the Commission pointed out that Centea and Fidea – i.e. the entities that KBC had to divest – were “attractive targets for competitors wishing to enter the Belgian market, because Centea and Fidea have a well-established brand name and distribution networks”.[51]

49. It should be pointed out that this type of divestment was mentioned in some other decisions. This was the case with Anglo Irish Bank, EBS and Dunfermline. For instance, in the Opening Decision on Anglo Irish Bank (31 March 2010, para. 141), the Commission observed that Anglo Irish Bank had not considered any divestment or structural measure in Ireland that could facilitate entry or expansion of a competitor.
50. ING, C10/2009, 18 November 2009, para. 144-145.
51. KBC, C18/2009, 18 November 2009, para. 176.

Similarly, in the decision on Royal Bank of Scotland (RBS), the Commission considered the Rainbow Business – i.e. the entity that RBS had to divest – to be "a sufficiently attractive target for some competitors wishing to enter the UK market or expand their presence there".[52]

The third observation concerns the *feasibility of creating a viable standalone entity*. It is of importance that the divested entity should be a viable standalone entity. In the decision on Dunfermline, the Commission remarked that Dunfermline was very small, since it had less than 40 branches. Consequently, the Commission concluded that it did not seem likely that a viable entity could be divested from it.[53] So the fact that the beneficiary bank is very small has a negative impact on the feasibility of creating a new competitor. In the decision on KBC, the Commission noted that Centea and Fidea were relatively easy to separate from KBC's Belgian business unit.[54] The fact that the divestment business is relatively easy to separate has a positive impact on the feasibility of creating a viable standalone entity.[55]

The fourth observation concerns the *divestment-related commitments*. This observation merits some further discussion: see subsections 13.5.3.1 to 13.5.3.3.

13.5.3.1 Value preservation commitments

It usually takes some time before the divestment is achieved. In fact, it can even take years. In the meantime, the divestment business *should remain viable*. This follows from the very logic of this type of divestments; which is aimed at creating a new competitor. The divestment business should thus not be hollowed out by the beneficiary bank. Many decisions in which the divestment is specifically aimed at creating a new competitor therefore contain several divestment-related commitments to ensure that the divestment business remains viable, marketable and competitive. These commitments are sometimes referred to as 'value preservation commitments'.

One of the commitments is the appointment of a *Hold Separate Manager*. The divestment business has to be managed as a distinct and saleable entity. This is why in many cases a Hold Separate Manager is appointed for the divestment business. In many decisions, it is specified that the hold separate manager can be the current CEO of the divestment business.

52. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 244.
53. Dunfermline, NN19/2009, 25 January 2010, para. 129.
54. KBC, C18/2009, 18 November 2009, para. 173.
55. This characteristic could have been elaborated by other characteristics (that explain why it is easy to separate), but this is not done in the Commission decisions.

Another commitment concerns the *employees* of the divestment business. For instance, Ethias committed to encourage all key personnel[56] to remain with the divestment business.[57] Sometimes this commitment is not formulated as an obligation, but as a prohibition: RBS committed that it would not actively target employees working within the divestment business to transfer to RBS.

The value preservation commitment can also concern the *clients* of the divestment business. This commitment entails that the beneficiary bank has to refrain from actively soliciting clients of the divestment business.

A very general value preservation commitment is the commitment not to carry out any act that might have a significant *adverse impact* on the value, management or competitiveness of the divestment businesses. Sometimes this commitment is formulated as follows: "LBG shall carry on the Divestment Business as a going concern in the ordinary and usual course as carried on prior to the Relevant Date".

Most decisions in which the divestment is specifically aimed at creating a new competitor contain the same value preservation commitments. Nevertheless, there are some (minor) differences. For instance, the commitment related to targeting the clients of the divestment business only appears in a few decisions. Furthermore, it should be noted that the commitments are not always formulated in the same way.[58] Notwithstanding those small variations, the cases do not really differ on the value preservation commitments.

13.5.3.2 Purchaser requirements

In some cases, there are requirements that have to be met by the purchaser of the divestment business. This can be illustrated by the decision on Royal Bank of Scotland (RBS). This bank committed to divest the Rainbow Business. The purchaser of the Rainbow Business had to meet the requirements listed in recital 99 of the decision. In the assessment-part of the decision, the Commission elaborated two of the purchaser requirements. The Commission noted positively that there was a special commitment that the buyer's share in the SME market might not exceed 14%[59] after the purchase of the divested entity.[60] The

56. In the Annex of the Decision, 'key personnel' is defined as "all personnel necessary to maintain the viability and competitiveness of the divestment business".
57. Ethias, N256/2009, 20 May 2010, annex point 40. NB: not only with respect to Nateus, but also with respect to Ethias Banque and BelRe.
58. Sometimes they are formulated as a positive obligation (for instance the commitment to encourage employees to remain with the divestment business) and sometimes as a negative obligation (for instance, to not target the employees of the divestment business).
59. The Commission indicated that this percentage of 14% was the result of an analysis by the Office of Fair Trading (OFT).
60. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 246.

rationale of this commitment was to prevent that the divestment would not result in the strengthening of another leading market player. The condition that the buyer had to be vetted by the FSA was also noted positively. The Commission welcomed these purchaser requirements, since these requirements would ensure “that the planned divestment of the Rainbow Business would lead to increased competition on the concentrated UK banking sector by introducing a challenger or reinforcing a small existing player”.[61]

The purchaser requirements that appear in the other decisions are not always expressed in the same terms as in the decision on RBS, but they more or less amount to the same. Most of these decisions contain the condition that the purchaser of the divestment business should be *independent* of and *unconnected* to the beneficiary bank. The ATE-decision mentions that “the notion of independence follows from the rationale of a compensatory measure, which requires a bank to dispose of an asset and not to sell it to a connected entity like a subsidiary or shareholder (independence is not hampered by a very small interconnection that does not give the other party a significant influence)”.[62] The RBS-decision even contained an elaboration of ‘independent and unconnected’.

The condition that the purchaser must have the *financial resources, proven expertise and incentive* to maintain and develop the Divestment Business can also be found in many decisions. The RBS-decision included the condition that the capability of the purchaser to develop the divestment business should be analysed by the financial supervisory authority.

Some decisions contain the requirement that the purchaser “must neither be likely to create prima facie *competition concerns* nor give rise to a risk that the implementation of the commitments will be delayed”.[63]

The only purchaser requirement that does not typically figure in every decision is the requirement that *market share may not exceed x%.* It should be recalled that the decision on RBS included the requirement that the market share of the purchaser would not be higher than 14%. This specific purchaser requirement only appeared in the decision on RBS, LBG and KBC. The other decisions containing purchaser requirements do not include this specific purchaser requirement. In the LBG-decision, the requirement was formulated in similar terms as in the RBS-decision. The KBC-decision contained purchaser requirements with respect to Centea and Fidea.[64] These subsidiaries may not be

61. Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 246.
62. ATE, N429/2010, 23 May 2011, annex point 10.
63. Ethias, N256/2009, 20 May 2010, annex 2.5.
64. KBC, C18/2009, 18 November 2009, para. 85.

bought by a bank with a post-acquisition market share of greater than […]%. The case of KBC is somewhat special, since the market share ceiling is the only purchaser requirement; the other purchaser requirements are not mentioned in the KBC-decision.

In my opinion, the relevance of most of these purchaser requirements is quite limited. To some extent, they are self-evident. The condition that the purchaser should be independent and unconnected to the beneficiary bank follows from the very logic of creating a new competitor. The condition that the financial supervisory authority should verify that the purchaser has the "financial resources, proven expertise and incentive to maintain and develop the Divestment Business" also does not contribute much. The existing financial regulations already provide that acquisitions of financial institutions should be authorised by the relevant financial supervisory authority. Only the condition that the market share of the purchaser must not exceed x% has real relevance.

13.5.3.3 An inconsistency?

As explained above, there is a link between divestment-related commitments and divestments aimed at creating a new competitor. However, this link is not consistently made in the decisions.

The decisions on RBS, LBG, KBC, Ethias, ING, Bank of Ireland, Parex, LBBW, Sparkasse KölnBonn, ATE contain value-preservation commitments.[65] With the exception of LBBW, all these cases are also characterised by purchaser requirements.[66] Most of these cases are characterised by divestments aimed at creating a new competitor. So the fact that these cases contain value-preservation commitments and purchaser requirements makes sense.

However, there are also divestment-related commitments in the cases of LBBW, Sparkasse KölnBonn and ATE. This is somewhat peculiar, because the divestments in these cases were not specifically aimed at creating a new competitor. For instance, the restructuring plan for LBBW envisaged that LBBW would divest a large number of subsidiaries. In the Restructuring Decision, it is not clearly mentioned whether those divestments were aimed at

65. RBS, para. 102-103 and 245; LBG, para. 189; KBC, para. 86; Ethias, annex point 40-45; ING, 18 November 2009, para. 147; Bank of Ireland, 15 July 2010, para. 147; Parex banka, 15 September 2010, para. 74-75; LBBW, para. 103; Sparkasse KölnBonn, annex section C; ATE, 23 May 2011, annex section C.
66. RBS, para. 99; LBG, para. 105; KBC, annex xxiii; Ethias, annex 2.5; ING; Bank of Ireland, 15 July 2010, para. 146; Parex banka; Sparkasse KölnBonn, annex section D; ATE, 23 May 2011, annex section D.

creating challenger banks. However, one of the commitments was "to ensure that the value of the units to be sold would not be affected by the fact that customers or staff would be lured away from these units".[67] This seems to be a value preservation commitment. This is somewhat surprising, because the divestment was not specifically aimed at creating a new competitor.

Another case featuring divestment-related commitments is the case of Sparkasse KölnBonn. Section C of the Annex of the Restructuring Decision contains divestment-related commitments. However, the rationale of these divestment-related commitments cannot be found in the assessment-part of the decision. The same observation can be made with respect to ATE (2011). While the annex of a Commission decision constitutes an integral part of the decision[68], one would expect that the rationale of commitments enshrined in the annex can be found in the recitals of the decision. However, in the case of Sparkasse KölnBonn and ATE (2011), the divestment-related commitments enshrined in the annex of the decisions cannot be linked to the recitals of the decision. In my opinion, this is incoherent.

In addition to being *incoherent*, the fact that this link is missing in these decisions amounts to an *inconsistency*, since the decisions on RBS, LBG, KBC, Ethias, ING, Bank of Ireland and Parex do contain a link between divestment-related commitments and divestments aimed at creating a new competitor.

And even with respect to the cases in which the divestment was aimed at creating a new competitor, the link between this type of divestment and the divestment-related commitments is not consistently made. For instance, the purchaser requirements in the case of RBS only concerned the Rainbow Business. This makes sense, since only the divestment of the Rainbow Business was aimed at creating a new competitor, whereas the other divestments had other purposes (i.e. own contribution of the bank). By contrast, the purchaser requirements in the case of Ethias concern the divestment of Ethias banque, Nateus Group and Belré, while only the divestment of Nateus Group was aimed at creating a new competitor.

Thus, the main finding is that in some cases, the divestment-related commitments apply to all divestments, whereas in some other cases, the divestment-related commitments only apply to the divestments that are specifically aimed at creating a new competitor. This finding points at an inconsistency.

67. LBBW, 15 December 2009, para. 103.
68. NordLB, 25 July 2012, para. 88; OVAG, 19 September 2012, para. 71.

13.5.4 Amendments

In total, seven banks committed to divest or carve out a subsidiary in order to create a new competitor. It is noteworthy that in six of these seven cases, the divestment proved to be quite difficult to achieve within the stipulated timeframe.[69] With respect to these six cases, the Commission accepted amendments. In particular, the divestment deadline was extended in four cases (RBS, LBG, Parex banka and KBC), while in two cases (Bank of Ireland and ING), the divestment-commitment was changed.

In the cases of RBS, LBG, Parex banka and KBC, the Commission extended the divestment deadline.[70] The case of RBS might serve as an illustration. Under the original restructuring plan, RBS had committed to divest the Rainbow Business. However, RBS was unable to complete this divestment before the deadline of 31 December 2013. The UK State therefore requested the Commission to extend the divestment deadline. The Commission noted that RBS had genuinely tried to divest the Rainbow Business within the stipulated timeframe.[71] The Commission called this "a positive element in [its] assessment".[72]

In the case of Bank of Ireland, the divestment-commitment was superseded by more recent events. Under the first restructuring plan, Bank of Ireland planned to divest its Irish broker mortgage business (ICS). The Commission remarked that "ICS is an attractive acquisition for a bank willing to set up a new business in Ireland, or willing to expand its existing business".[73] Under the second restructuring plan of Bank of Ireland, the commitment to divest ICS was changed dramatically: the divestment of ICS was no longer deemed appropriate.[74] Bank of Ireland faced deposit outflows, which made the divestment of ICS contradictory with the goal of ensuring the long-term viability of Bank of Ireland.

ING had committed to divest WUH/Interadvies. ING had contacted many market parties, but there was no real interest in WUH/Interadvies.[75] Therefore, the Netherlands proposed to amend the commitment to divest WUH/Interadvies. ING would integrate parts of WUH/Interadvies with Nationale Nederlanden

69. Only Ethias succeeded in divesting its subsidiary Nateus within the agreed timeframe.
70. KBC, MC11/2009, 16 December 2010, para. 37-49.
71. Royal Bank of Scotland (RBS), SA.38304, 9 April 2014, para. 84.
72. Royal Bank of Scotland (RBS), SA.38304, 9 April 2014, para. 86.
73. Bank of Ireland, N546/2009, 15 July 2010, para. 251.
74. Bank of Ireland, SA.33443, 20 December 2011, para. 183.
75. ING, SA.29832, 16 November 2012, para. 25.

Bank (NN Bank)[76] and divest that integrated entity as part of ING Insurance Europe.[77] In the 2012 Restructuring Decision, the Commission accepted the amendment of the divestment-commitment.[78]

13.5.5 Concluding remarks

While almost every bank State aid case is characterised by divestments, not all divestments are specifically aimed at creating a new competitor. Indeed, as set out in the present section, only in the cases of KBC, ING, LBG, RBS, Ethias, Bank of Ireland and Parex banka, the divestments were aimed at creating a new competitor. Why only in these cases? Why are the other bank State aid cases not characterised by this type of divestment? Remarkably, the Commission did not clarify why this type of divestment was not needed in all cases. While there may be valid reasons to change the approach towards this specific type of divestment, changing the approach without a clear explanation points at an inconsistency.

Subsection 13.5.4 discussed the amendment decisions in the cases that were characterised by divestments aimed at creating a new competitor. These amendment decisions illustrate that this type of divestment is not very easy to implement. This raises questions as to its effectiveness. From this viewpoint, it might be a good thing that this type of divestment is no longer required by the Commission.

Needless to say that downsizing is still an essential element of the restructuring plan; this particular restructuring measure will be set out in detail in the next section.

13.6 Downsizing (I): balance sheet reduction

* *The fact that the restructuring plan provides for a reduction of the balance sheet size of the beneficiary bank.*

13.6.1 Why is this a relevant characteristic?

Downsizing is aimed at reducing the market presence of the beneficiary bank. It is a compensatory measure; i.e. a measure to limit distortions of competition caused by the State aid. Downsizing can be measured in several ways: a bank can downsize in terms of balance sheet size, scope of activities, branch

76. NN Bank was the recently established banking division of Nationale Nederlanden.
77. ING, SA.29832, 16 November 2012, para. 5.
78. ING, SA.29832, 16 November 2012, para. 194.

network ("geographical footprint") and staff. Downsizing in terms of balance sheet size will be discussed in the current section, while section 13.7 will discuss downsizing in terms of branch and staff reduction.

It should be recalled that the divestments discussed in section 13.5 were specifically aimed at creating a new competitor on the market ("challenger bank"). The divestments discussed in the current section have a more general objective: namely reducing the market presence of the beneficiary bank.

13.6.2 Has the Commission consistently taken into account this relevant characteristic?

The concept of the relevant context is particularly relevant here. The balance sheet reduction is a very important compensatory measure for banks that continue to exist as a standalone entity (i.e. the C-context). The other contexts are also characterised by downsizing. However, this downsizing takes a different form. In the S/T/W-context and in the S/C/W-context, the bank is split-up. The split-up of the bank obviously results in the downsizing of the bank, but this downsizing is not achieved by a balance sheet reduction.[79] In the T-context, the (majority of the) bank's activities are transferred to another bank. In this context, downsizing can be relevant. However, this mainly concerns downsizing of the territorial presence through a reduction of the branch network.[80] This will be discussed in section 13.7. Finally, the winding-down of a beneficiary bank is the most extreme form of downsizing. Thus, in the W-context, the bank will eventually exit the market. In other words: the market presence of the beneficiary bank will be reduced to zero.

The table in Annex XII gives an overview of the banks that were subject to downsizing in the form of a balance sheet reduction. As can be seen, most cases in the C-context are characterised by a balance sheet reduction. In three cases, however, structural remedies were not needed: the Hungarian bank FHB, the Lithuanian LCCU and the Bulgarian bank FIB. So there is no balance sheet reduction in these three cases, but there is a justification.

I am of the opinion that the principle of equal treatment does not require that there is a balance sheet reduction in each and every case. However, it does require that the Commission takes, in each and every case, the balance sheet

79. Nevertheless, the balance sheet reduction is sometimes mentioned in cases in the S/C/W-context: in the decision on Kommunalkredit Austria (SA.32745, 31 March 2011, para. 96), the Commission mentioned that the restructuring plan included a significant downsizing of the bank: the balance sheet total would be reduced by more than 60%.
80. NB: sometimes it takes the form of a reduction of the scope of activities. See Amagerbanken and Eik banki.

reduction into consideration when assessing the compatibility of the State aid. There was a justification for the absence of a balance sheet reduction in the cases of FHB, LCCU and FIB. The fact that this justification is mentioned in these three decisions illustrates that the Commission has always taken into account the current relevant characteristic.

To conclude, there is therefore nothing that would indicate that the Commission has not consistently taken into account this relevant characteristic.

13.6.3 How is this relevant characteristic elaborated in the decisions?

With respect to the elaboration of the balance sheet reduction, the following questions are of importance. Firstly, is the percentage of the balance sheet reduction always mentioned *in combination with the relative aid amount*? Secondly, does it matter how the balance sheet reduction is achieved (i.e. does it matter *which activities* are divested)? Thirdly, are there circumstances that justify a lower degree of downsizing? Fourthly, does it matter if certain divestments are needed from a *viability*-perspective? And finally, does the *timeframe* of the divestments matter? These five questions will be addressed in the following five subsections.

13.6.3.1 The relevance of the aid intensity

To some extent, the balance sheet reduction is related to the relative amount of State aid: one would expect that the larger the relative amount of aid, the larger the balance sheet reduction.[81] It should, however, be kept in mind that the competition distortions are not only influenced by the amount of aid, but also by other factors such as the market presence. Furthermore, the balance sheet reduction is not the only compensatory measure. All this raises the following question: is the percentage of the balance sheet reduction always mentioned in combination with the relative aid amount?

On the basis of the analysis of the decisional practice, the following observations can be made.

In the first place, there are decisions that show the following pattern.[82] Firstly, the aid amount (as a percentage of the bank's RWA) is mentioned. Secondly, it is concluded that the aid amount must be reflected in the compensatory measures. Thirdly, the compensatory measures are discussed, one of which is the

81. To some extent, the compensatory measures are related to the competitive impact of the aid. Nevertheless, some compensatory measures are always required by the Commission, irrespective of the precise competitive impact. The prime example is the acquisition ban. This compensatory measure is always required (in cases in the C-context).
82. The Restructuring Decision on MPS (SA.36175, 27 November 2013, para. 152-155) is a good example.

balance sheet reduction. So there is some relation between the percentage of the balance sheet reduction and the aid amount, but it is not a direct relation (since the balance sheet reduction is only one of the compensatory measures).

In the second place, there are decisions in which the percentage of balance sheet reduction was explicitly mentioned in combination with the aid amount. For instance, in the Restructuring Decision on HSH Nordbank, the Commission noted that "the reduction of HSH by more than half[83] is appropriate, given the distortions of competition stemming from the large amount of aid received".[84] Another example is the Opening Decision on HRE, in which the Commission expressed its view that it expected additional measures: the Commission considered that the balance sheet reduction of 25% in the case of HRE seemed insufficient in view of the aid amount.[85]

In the third place, there are decisions in which the percentage of the balance sheet reduction was *not mentioned at all*. For instance, the decision on IL&P indicates that the bank will reduce the size of its balance sheet to a level of EUR [20-30] billion, but a specific percentage is not mentioned.

To conclude, the decisional practice does not show a consistent picture of the relation between the aid amount and the balance sheet reduction.

13.6.3.2 The percentage of the balance sheet reduction

In some decisions, the emphasis is on the way how the balance sheet reduction is achieved (i.e. which activities are divested), while in other decisions, the emphasis is on the percentage of the balance sheet reduction. This raises the question what is more important: the percentage or the divestments? Is the main goal of downsizing that a certain percentage is reached? Or that certain

83. Pursuant to the restructuring plan, HSH Nordbank would reduce its balance sheet by 61% by the end of 2014 compared to 2008.
84. HSH Nordbank, SA.29338, 20 September 2011, para. 266.
85. Hypo Real Estate (HRE), C15/2009, 24 July 2009, para. 66. Sometimes, there is a difference between the Opening Decision and the Restructuring Decision. For instance, in the Opening Decision on EBS, "the Commission criticised that the proposed balance sheet reduction was far less substantial than the Commission would normally have expected from a bank having received such a high amount of aid, both in absolute terms and in terms of risk weighted assets" (AIB/EBS, 7 May 2014, para. 91). The Opening Decision thus stressed the relation between the aid amount and the balance sheet reduction. However, in the Restructuring Decision on AIB/EBS, the Commission did not mention the balance sheet reduction in its assessment of the compensatory measures. The case was characterised by a balance sheet reduction, but this was only mentioned in the context of the viability.

activities are divested? In other words: is reaching a certain percentage of the balance sheet reduction the main *goal* of the divestments or the *consequence* of the divestments?[86]

In many decisions, the percentage of the balance sheet reduction is mentioned explicitly. For instance, in the decision on ATE, a very specific percentage was mentioned: the balance sheet size had to be reduced by (at least) 25,7%. The restructuring plan provided that the balance sheet size amounts could be corrected (for instance, for foreign exchange movements).[87] This illustrates that in the decision on ATE, the emphasis is really on the percentage of the balance sheet reduction.[88]

By contrast, in many decisions, the emphasis seems to be on the on the type of activities to be divested rather than the percentage of the balance sheet reduction. This conclusion is based on three observations.

The first observation is of a linguistic nature. In some decisions, the percentage of the balance sheet reduction seems to be the consequence of the restructuring measures. For instance, in the decision on NordLB, the Commission held as follows: "*As a consequence of the implementation of the restructuring measures*, NORD/LB will reduce its total balance sheet between 2011 and 2016 by around 15%".[89] Similarly, in its decision on Commerzbank, the Commission noted that "these measures *will result* in a lasting reduction in its balance sheet total by approximately 45%".[90]

Secondly, in some decisions, there is a geographical focus. For instance, with respect to the Spanish banks that were split into a core unit and non-core unit, the downsizing of the core unit (and the subsequent reduction of the market presence of the core unit) was viewed positively by the Commission, because the Commission considered that the competition distortions would be most

86. To some extent, this question is related to the question discussed in the previous subsection: if the percentage of the balance sheet reduction is directly related to the relative aid amount, then the emphasis is on the percentage rather than on the activities to be divested.
87. ATE, N429/2010, 23 May 2011, annex point 15.
88. The same provision can be found in the decision on BayernLB (SA.28487, 5 February 2013, annex point 5): "any overrun with respect to this sum will be disregarded in so far as it is due to a decrease in the EUR/USD exchange rate below the rate referred to in the second sentence of point 4."
89. NordLB, SA.34381, 25 July 2012, para. 165. A similar consideration can be found in the decision on Sparkasse KölnBonn (para. 97). See also Parex banka, C26/2009, 15 September 2010, para. 152.
90. Commerzbank, N244/2009, 7 May 2009, para. 112.

significant in the core region of the bank. This implies that the emphasis is on the type of activities to be divested rather than the percentage of the balance sheet reduction.

The decisions on the four large Greek banks do not mention a percentage of the balance sheet reduction. An important element of those cases is that the restructuring plans did not envisage any downsizing of the balance sheet in Greece. This was justified by the fact that the difficulties of these four Greek banks were mainly caused by external factors. The downsizing only concerned the international activities of the Greek banks.[91] This implies that the emphasis is on the type of activities to be divested rather than the percentage of the balance sheet reduction.

Thirdly, some decisions contain the commitment that the bank will withdraw from certain activities. This constitutes downsizing *in terms of the scope of activities*. This commitment is often mentioned separately from the commitment to reduce the size of the balance sheet. However, abandoning certain activities will normally result in a reduction of the balance sheet size. Thus, in my opinion, the discontinuation of certain activities contributes to the balance sheet reduction. Furthermore, a reduction of the scope of activities implies that the emphasis is on the type of activities to be divested rather than the percentage of the balance sheet reduction.

The core unit of Catalunya Banc would focus exclusively on retail, SME, corporate and public sector banking and *would exit the market* in all other banking segments.[92] The commitment to abandon certain activities is sometimes formulated as a commitment not to engage in certain activities. For instance, the restructuring plan of Catalunya Banc envisaged that the activities of the core unit of Catalunya Banc would be restricted: the core unit of Catalunya Banc would not engage in any new business during the restructuring period in the areas of real estate development, wholesale activities and loans outside its core region.[93]

91. In that regard, it should be recalled that the deleveraging of the international activities was also a viability-measure.
92. Catalunya Banc, SA.33735, 28 November 2012, para. 184.
93. Catalunya Banc, SA.33735, 28 November 2012, annex point 5.3.4. The same restrictions can be found in BFA/Bankia (para. 212), Banco CEISS (para. 164). Other examples of banks that committed to abandon several activities are CCI/CCB (that committed not to engage in foreign markets or in new in-house activities such as the creation of insurance products or structured products) and BayernLB (that committed that it would abandon several activities, such as shipping and aviation).

To conclude, the percentage of the balance sheet reduction and the type of activities to be divested are both important. They do not have to exclude each other. It can be argued that in the first place, certain activities are chosen to be divested; and that in the second place, it is checked whether these divestments achieve a percentage that is sufficient (as compared to the relative aid amount).[94]

13.6.3.3 Limited possibilities for downsizing

The 2015 restructuring plans of Eurobank, Alpha Bank, Pireaus Bank and National Bank of Greece (NBG) did not envisage any downsizing of the loans to households and businesses in Greece. In its decisions on these banks, the Commission noted that these four large banks accounted for more than 95% of the market and that "it would have adverse macro-economic effects to accept commitments from the Member State concerned regarding each of them to reduce their lending to the Greek economy".[95] The Commission therefore *exceptionally* accepted a lower degree of downsizing. These cases illustrate that the Commission takes into account that too much downsizing of the beneficiary bank may produce negative effects on the economy of the Member State. The effect on the real economy can thus be used as a justification for a lower degree of downsizing.

Another case in which the Commission took into account the effects of the restructuring on the real economy, was KBC. Pursuant to its restructuring plan, KBC would not withdraw from its CEE-R markets and Ireland. The Commission approved this, because "it could be damaging to financial stability in these countries and lending to the real economy if KBC was required to further reduce its presence in the region".[96] The fact that further restructuring could be damaging to financial stability could thus be a reason for the Commission not to require further restructuring.

It should be stressed that taking into account the effect of downsizing on the real economy can also result in the conclusion that there is absolutely no reason to lower the downsizing requirement. For instance, in the decision on Sparkasse KolnBonn, the Commission noted that the reduction of the bank's presence in certain customer segments affected mainly large entities and that those entities generally have access to the capital market. The Commission therefore considered "*the risk of negative impact on the real economy of this measure to be negligible*".[97]

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94. This concerns the relation between the aid amount and the percentage of the balance sheet reduction (which was discussed in the previous subsection).
95. Eurobank, SA.43363, 26 November 2015, para. 117.
96. KBC, C18/2009, 18 November 2009, para. 177.
97. Sparkasse KolnBonn, C32/2009, 29 September 2010, para. 96.

In my opinion, the Commission should be applauded for taking into account the fact that too much downsizing of the bank might produce negative effects on the economy of the Member State. Indeed, the very purpose of State aid to banks is to preserve financial stability. Requiring too much downsizing might contravene that objective.

13.6.3.4 Divestments needed for viability-reasons

To what extent can the divestments needed from a viability-perspective be considered as a compensatory measure? This question especially arises when the balance sheet reduction results from the disposal of loss-making subsidiaries or of low quality assets (or even impaired assets).[98]

One of the cases in which the Commission did not accept divestments as a compensatory measure is the case of OVAG. In the Opening Decision on OVAG, the Commission welcomed the significant reduction in size by OVAG. The reduction amounted to [60-75%] in terms of balance sheet size and to [60-75%] in terms of RWA. Although these percentages indicate a very significant reduction in size, the Commission noted that these percentage included the divestment of KA.[99] The Commission noted that the divestment of KA by OVAG was rather a measure to improve OVAG's viability.[100] This was due to the fact that KA had many problems, so the divestment of KA actually contributed to the stabilisation of OVAG. Hence, the divestment of KA could not be considered as a measure to limit the distortions of competition.[101]

Thus, the disposal of loss-making subsidiaries is not accepted as a compensatory measure. In the same vein, the disposal of impaired assets contributes to the restoration of long-term viability of the bank. It can therefore be considered as a viability-measure. It can less easily be considered as a compensatory measure.

13.6.3.5 Other modalities: timeframe

The timeframe of the divestments is of importance. It is viewed positively when the Member State can provide a detailed timeline for the planned divestments.[102] This can be illustrated by the Opening Decision on BayernLB,

98. Point 12 of the Restructuring Communication (in the section on the return to long-term viability) explicitly provides that restructuring requires a withdrawal from activities which would remain structurally loss-making in the medium term.
99. OVAG had sold its stake in KA for the nominal amount of EUR 1.
100. OVAG, SA.31883, 9 December 2011, para. 73.
101. OVAG, SA.31883, 19 September 2012, para. 125.
102. See, for instance: NordLB, SA.34381, 25 July 2012, para. 162; Sparkasse KolnBonn, C32/2009, 29 September 2010, para. 95.

in which the Commission noted that it had only been provided with target dates but with no firm commitments that the entities would be sold at the end of the restructuring period. The Commission therefore concluded that, at that stage, there was an uncertainty on the timing of the implementation of the compensatory measures, which shed doubts as to their effectiveness to mitigate distortions of competition.[103]

In the W-context, the timeframe of the downsizing is of great importance. A bank that is being wound-down will *eventually* exit the market, but not immediately. The duration of the winding-down period is therefore of importance.[104] The timeframe of the balance sheet reduction has an impact on how long the competition distortions remain. A rapid balance sheet reduction is thus welcomed by the Commission. For instance, in the decision on the Slovenian Probanka (December 2013), the Commission noted that "more than half of the Bank's balance sheet reduction will already occur by 31 December 2014".[105]

13.6.4 Concluding remarks

Although it has already been set out in several places in this PhD-study, it might nonetheless be worthwhile to stress the following: an inconsistency can occur at two levels. In the first place, there is an inconsistency when the Commission does not assess in every case whether the restructuring plan provides for a balance sheet reduction. In the second place, there is an inconsistency when the Commission does not take into account the differences in the modalities of the balance sheet reduction. As set out in subsection 13.6.2, there is no inconsistency on the first level.

By contrast, subsection 13.6.3 has shown that the balance sheet reduction is elaborated inconsistently. Firstly, the percentage of the balance sheet reduction is not always mentioned in combination with the relative aid amount. Secondly, in some decisions, the emphasis is on the way how the balance sheet reduction is achieved (i.e. which activities are divested), while in other decisions, the emphasis is on the percentage of the balance sheet reduction.

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103. BayernLB, N254/2009, 12 May 2009, para. 97. The same consideration can be found in the Opening Decision on HSH Nordbank (C29/2009, 22 October 2009, para. 79).
104. It should, however, be recalled that a bank in a winding-down process is subject to certain restrictions.
105. Probanka, SA.37642, 18 December 2013, para. 60.

13.7 Downsizing (II): reduction of branches and staff

* *The fact that the bank will reduce the number of branches.*
* *The fact that the bank will reduce the number of employees.*

13.7.1 Why are these characteristics relevant?

Many restructuring plans include the commitment to reduce the market presence of the beneficiary bank. This can be achieved by reducing the number of branches and the number of employees. Several decisions indicate that in parallel to the balance sheet reduction, the bank will shrink in terms of branches and headcount.[106] From this perspective, the reduction of the number of branches and employees is a compensatory measure (i.e. a measure to limit distortions of competition).

It should, however, be noted that the reduction of the number of branches and employees is not purely a compensatory measure; it is also a viability-measure and an own contribution-measure. The reduction of the number of branches is sometimes referred to as an 'optimization of the branch network'.[107] It can be a way to increase operational efficiency. In this sense, it is a cost-cutting measure (which improves the profitability – and thus the viability – of the bank).[108] At the same time, it constitutes an own contribution from the bank.

In the same vein, a reduction of the number of employees results in a reduction of the labour costs. In this sense, it is a cost-cutting measure, and thus a viability-measure and an own contribution measure. In the sense that a reduction of the number of employees contributes to reducing the market presence of the bank, it is a compensatory measure.

13.7.2 Has the Commission consistently taken into account these relevant characteristics?

Banks in the W-context are obviously characterised by downsizing. Most banks in the C-context committed to reduce the number of branches and employees. With respect to banks in the C-context, it is noteworthy that many core units were subject to these types of downsizing. This is illustrated by the cases of the Spanish banks in 2012. Many Spanish banks were downsized by means of a split up into a core unit and a non-core unit. A further downsizing (of the core unit) was achieved by the commitment in the restructuring plan that the number of branches and staff of the core unit would be reduced. The same holds true for the Portuguese banks (such as BPI).

106. See, for instance: Catalunya Banc, SA.33735, 28 November 2012, para. 181.
107. Caixa Geral de Depósitos (CGD), SA.35062, 24 July 2013, para. 30.
108. See, for instance: Alpha Bank, SA.34823, 9 July 2014, para. 109 and 274; BPI, SA.35238, 24 July 2013, para. 68.

Banks in the T-context are sometimes subject to a downsizing of their territorial presence. This is illustrated by the case of Banco Gallego, which was taken over by Banco Sabadell. The restructuring plan envisaged a downsizing of the territorial presence of combined entity:

> "The Commission notes that one of the main provisions of the Restructuring Plan is the downsizing of the territorial presence of combined entity. The Commission considers that the downsizing planned by the Restructuring Plan is more than adequate since at least [10-20]% of the legacy network of Banco Gallego will be phased out. The Commission also takes note of the fact that the total number of employees of the former Banco Gallego will be reduced by at least [10-20]%".[109]

In some cases in the T-context (and S/T/W-context), there is no downsizing of the territorial presence. This was the case with T Bank, Fionia Bank and Dunfermline. The Commission took into account the fact that these are *small banks*. When the transferred activities are very small, the Commission considers that the distortions of competition caused by the aid to the economic activities are limited.[110] In those cases, there is a justification for not requiring a reduction of the branch network of the transferred activities.

13.7.3 How are these relevant characteristics elaborated in the decisions?

The decisions usually indicate the percentage by which the number of branches and employees will be reduced. It is however not indicated whether that percentage is considered satisfactory. This stands in sharp contrast to the relevant characteristic discussed in the previous section: the balance sheet reduction. Indeed, as set out in that section, the percentage of the balance sheet reduction is quite important.

13.7.4 Concluding remarks

As set out in the present section, the Commission usually notes positively that the beneficiary bank will reduce the number of branches and employees. However, the Commission does not take particular note of the exact modalities of this relevant characteristic. This finding is in line with one of the main findings of this PhD-study: with respect to several relevant characteristics, the Commission notes positively that a case is characterised by a relevant characteristic, without taking into account the modalities of that relevant characteristic.

109. Banco Gallego, SA.36500, 25 July 2013, para. 141. Also the cases of Banco de Valencia (para. 194), UNNIM Banc (para. 183) and Cajatres (para. 163-164) are characterised by a downsizing of the territorial presence.
110. T Bank, SA.34115, 16 May 2012, para. 56; Dunfermline, NN19/2009, 25 January 2010, para. 129-130. See also: LCCU, SA.34208, 26 September 2012, para. 64.

13.8 Growth limitation

* *The fact that the restructuring plan provides for a growth limitation.*

13.8.1 Why is this a relevant characteristic?

A growth limitation usually takes the form of a cap on new lending and on new deposits. A growth limitation is less far-reaching than downsizing. Downsizing *reduces* the bank's market presence, whereas a cap only *limits the possibility* for the bank *to expand* its market presence.

Point 32 of the Restructuring Communication provides that divestments may sometimes generate adverse consequences, in which case the *limitation of organic growth* may be preferred to divestments.[111]

13.8.2 Has the Commission consistently taken into account this relevant characteristic?

Three observations can be made. First of all, there are not many cases that include a growth limitation. This can be explained by the fact that many cases are already characterised by divestments and balance sheet reductions.

The case of HSH Nordbank is one of the few cases that features a growth restriction. The Commission welcomed the commitment that the global market share of HSH Nordbank in new shipping business would not exceed [<8]% during the entire restructuring plan.[112] In addition, HSH would undertake not to be among the top 3 ship-financing providers with the highest annual volume of new businesses.[113] It should be noted that this commitment concerned markets in which HSH Nordbank had acquired strong market positions and that HSH Nordbank had a leading position on the market for ship financing. Interestingly, HSH Nordbank was also subject to a far-reaching balance sheet reduction. So the growth limitations did not substitute – in the spirit of point 32 of the Restructuring Communication – the divestments.

Other examples of cases including a growth limitation are the cases of Parex banka and Northern Rock. The restructuring plan of Parex banka provided for a split into a newly established bank named Citadele banka (the "good bank")

111. Since point 32 speaks of "organic growth", it might be useful to clarify this term. Organic growth can be contrasted with inorganic growth. Inorganic growth is due to mergers and acquisitions, whereas organic growth is generated by an increased output (which, in the case of banks, means increased lending).
112. HSH Nordbank, SA.29338, 20 September 2011, para. 269 and Annex 4.9.
113. HSH Nordbank, SA.29338, 20 September 2011, para. 269 and Annex 4.9.

and Parex banka (the "bad bank"). This case thus concerned a bank in the S/C/W-context. One of the commitments of Citadele banka was a cap on new lending and deposits.[114] Similarly, BankCo – the 'good bank' resulting from the split-up of Northern Rock – committed to cap new lending and to cap its retail deposit balances.[115] The growth restriction in these cases were commitments regarding the remaining good bank (Citadele and BankCo respectively). These cases are thus characterised by downsizing (because the banks were split into a good bank and a bad bank) and growth limitations (to which the good bank had to comply).

A second observation is that the decisions only mention the growth limitation if such a growth limitation is present in the case; it is not mentioned if it is absent. The only exception is the Restructuring Decision on ING. This decision specified that ING would not have a restriction on *organic* growth of the balance sheet of its businesses.[116] By contrast, ING was restricted in its *non-organic* growth: ING was subject to an acquisition ban.

A third observation is that the distinction between a *reduction* and a *limitation* is not always made clear in the decisions. This can be illustrated by the decisions on the Slovenian banks Abanka, Nova Kreditna Banka Maribor (NKBM) and Nova Ljubljanska banka (NLB). Abanka would ensure that the RWA would be capped according to the schedule included in the restructuring plan.[117] This schedule is not visible in the decision, because it was treated as confidential information. Since the scheme is not visible, it cannot be established whether the cap constitutes a limitation of the RWA or a reduction of the RWA. A cap above the current level constitutes a growth limitation, while a cap below the current level constitutes a reduction. Interestingly, the restructuring plans of NKBM and NLB (two other Slovenian banks) use the words *reduction* instead of *cap*: "The reduction of NLB's market presence in loans to the corporate sectors of construction, transport and financial holdings is achieved thanks to the yearly limitations on RWA in those sectors".[118] The confusing use of the terms 'cap', 'limitation' and 'reduction' makes it difficult to establish exactly how many cases are characterised by growth limitations.

114. Pursuant to the Amendment Decision of 10 August 2012, the caps on lending were amended so as to allow carrying forward unused lending allowances from previous years to the following years.
115. Northern Rock, C14/2008, 28 October 2009, para. 29-ii and iii. See also para. 129.
116. ING, C10/2009, 18 November 2009, para. 82.
117. Abanka, SA.38228, 13 August 2014, annex point 6.
118. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 48 and annex point 4b; Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 165.

13.8.3 How is this relevant characteristic elaborated in the decisions?

The cases discussed in the previous subsection already provide an illustration of how this relevant characteristic is elaborated. As set out in that subsection, the picture that emerges from the analysis of the Commission decisions is a bit vague.

13.8.4 Concluding remarks

The presence of growth limitations is noted positively by the Commission, because it restricts the bank's ability to expand on the market. It is thus a relevant characteristic. It is, however, difficult to establish whether the Commission has consistently taken into account this relevant characteristic.

The growth limitations discussed in the present section concerned restrictions on *organic* growth of the bank. The restrictions on *inorganic* growth (i.e. acquisition bans) are far more common – this will be discussed in the following section.

13.9 Acquisition ban

* *The fact that the beneficiary bank is subject to an acquisition ban.*

13.9.1 Why is this a relevant characteristic?

The acquisition ban[119] is an important behavioural restriction that is imposed on many beneficiary banks. Roughly speaking, an acquisition ban means that the beneficiary bank shall not acquire any stake in any undertaking.

A restructuring plan is based on three pillars and the acquisition ban is important for two of these pillars: i.e. the second pillar (own contribution) and the third pillar (minimizing competition distortions). That the acquisition ban is important for two pillars if reflected by the fact that the acquisition ban is mentioned in two different places in the Restructuring Communication.

In the context of the *second* pillar, point 23 of the Restructuring Communication provides that the restructuring aid should be limited to covering costs which are necessary for the restoration of viability. In this context, the Commission welcomes acquisition bans. The Commission considers that an acquisition ban

119. Sometimes referred to as "restriction of external growth". See for instance: HSH Nordbank, SA.29338, 20 September 2011, annex point 5.

"gives additional assurance that the restructuring plan and costs will be focused on restoring the viability of the core existing activities and that the bank will not use its own resources or the State support for external growth". This consideration – in these exact wordings – can be found in many decisions.[120]

In the context of the *third* pillar, point 40 of the Restructuring Communication provides that State aid should not be used for the acquisition of competing businesses. In many decisions, the Commission considered that the acquisition ban prevented the beneficiary bank from using the State aid to purchase competitors or to grow externally at the expense of other financial institutions.[121] Another formulation is: "the acquisition ban ensures that the State aid will not be used to take over competitors, but that it will instead serve its intended purpose, namely to restore the beneficiary bank's viability".[122] In one of its decisions, the Commission underlined that the acquisition ban prevents the bank from growing inorganically.[123]

13.9.2 Has the Commission consistently taken into account this relevant characteristic?

The analysis of the Commission decisions reveals the following pattern. In all the cases in which the beneficiary bank continued to exist as a standalone entity (i.e. the C-context), an acquisition ban was imposed. Acquisition bans also appear in the W-context: a bank in a winding-down process is in principle not allowed to engage in new activities; in the same vein, the bank will not be authorised to acquire (or take participations in) other firms.[124] By contrast, acquisition bans are usually not imposed in the T-context and S/T/W-context.

120. This consideration appeared in, inter alia: Bank of Ireland, 15 July 2010, para. 208; Bank of Ireland, 20 December 2011, para. 156; Royal Bank of Scotland (RBS), 14 December 2009, para. 207; HGAA, 3 September 2013, para. 153; Lloyds Banking Group (LBG), 18 November 2009, para. 157.
121. This consideration appeared in, inter alia: Lloyds Banking Group (LBG), N428/2009, 18 November 2009, para. 192; Royal Bank of Scotland (RBS), N422/2009, 14 December 2009, para. 251.
122. Banco Comercial Portugues (BCP), SA.34724, 30 August 2013, para. 117; Caixa Geral de Depósitos (CGD), SA.35062, 24 July 2013, para. 91.
123. Commerzbank, N244/2009, 7 May 2009, para. 111. The decision on ING (C10/2009, 18 November 2009, para. 148) contained an interesting extra consideration: "The Netherlands has also committed to an acquisition ban preventing ING from acquiring attractive businesses which will be likely brought to the market due to the general restructuring of financial firms and the overall sector. This prevents the non-organic growth of ING and allows other firms not having received State aid to purchase such businesses."
124. See, for instance: Anglo/INBS, SA.32504, 29 June 2011, para. 177.

The fact that the Commission does not require an acquisition ban in every case, raises the following question: does the Commission explain in its decisions why an acquisition ban is needed in a particular case?

In many decisions, the Commission did not dwell on the need for an acquisition ban. For instance, in the decision on Caixa Geral de Depósitos (CGD), the Commission only considered that “it welcomes an acquisition ban, which ensures that the State aid will not be used to take over competitors, but that it will instead serve its intended purpose, namely to restore CGD’s viability”.[125] Although this explain the ratio of the acquisition ban, it does not explain why an acquisition ban was needed *in that particular case*.

Only a very few decisions contain a consideration regarding the importance of an acquisition ban in that particular case. For instance, in the decision on Abanka, the Commission noted that the acquisition ban was “of particular importance in view of the high capital ratio maintained by Abanka during the restructuring period to sustain a stress situation”.[126] However, it could be argued that a detailed explanation (as to why an acquisition ban is needed in a particular case) would not be necessary, because requiring an acquisition ban is standard practice in the C-context.

This is confirmed by a decision (in the C-context) in which the Commission explained why the absence of an acquisition ban was justified. The ‘Restructuring and stabilisation scheme for the Credit Union Sector in Ireland’ did not include an acquisition ban. The Commission considered that in the exceptional case of the Irish credit unions, an acquisition ban was not required.[127]

If acquisitions are necessary for the restoration of long-term viability of the bank, then this might constitute a justification for not requiring an acquisition ban. This can be illustrated – a contrario – by the decision on ABN AMRO. In this decision, the Commission considered that acquisitions were not needed for the return to viability.[128] As a result, an acquisition ban did not go against the return to viability.[129]

In the T-context and in the S/T/W-context, the absence of an acquisition ban seems to be standard practice. This would seem to indicate that the relevant context could explain the absence of the acquisition ban. To some extent, this makes

125. Caixa Geral de Depósitos (CGD), SA.35062, 24 July 2013, para. 91.
126. Abanka, SA.38228, 13 August 2014, para. 155. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para 149.
127. SA.36262, 16 October 2014, para. 74.
128. ABN AMRO, C11/2009, 5 April 2011, para. 313.
129. The same consideration can be found in Banco Portugues de Negocios (BPN), SA.26909, 27 March 2012, para. 236.

sense. In the T-context and S/T/W-context, the activities of the ailing bank are transferred to a larger, viable bank. An acquisition ban would make it very unattractive for a potential acquiring bank to acquire the activities of the ailing bank.[130] This could explain the absence of an acquisition ban in the T-context and S/T/W-context. This is confirmed by the fact that the acquisition ban in the case of Catalunya Banc applied until the date of the integration of the bank with BBVA.[131]

Although an acquisition ban is absent in cases in the T-context and S/T/W-context, the Commission does not explain in its decisions why an acquisition ban is not needed in these cases. This is in sharp contrast with the decision on the 'Restructuring and stabilisation scheme for the Credit Union Sector in Ireland' in which the Commission considered that due to exceptional circumstances, an acquisition ban was not required.

Interestingly, there are two cases in the T-context that feature an acquisition ban.[132] This was the case in Banco CAM and BPN.[133] It is unclear why an acquisition ban was needed in those cases, whereas it is absent in other cases in the T-context.

To conclude, most decisions fit within the general pattern (that acquisition bans are present in the C-context, W-context and S/W/C-context; and absent in the T-context and S/T/W-context). In that regard, the Commission approach can be considered consistent. However, the principle of equal treatment requires not only that the Commission consistently assesses whether an acquisition ban is present, it also requires that the acquisition ban is elaborated in a consistent manner. This concerns the modalities of the acquisition ban, which will be discussed in the following subsection.

13.9.3 How is this relevant characteristic elaborated in the decisions?

As regards the modalities of the acquisition ban, a distinction can be made between the *duration* of the acquisition ban (see subsection 13.9.3.1), the *scope* of the acquisition ban (see subsection 13.9.3.2) and the *exemptions* to the acquisition ban (see subsection 13.9.3.3).

130. This view is also expressed by Franchoo, Baeten & Baker (2016, p. 487).
131. Catalunya Banc, SA.39402, 17 December 2014, annex 6.1.
132. In addition, there is one case in the S/T/W-context that features an acquisition ban: Banif, which was split-up into a Clean Bank and a Remaining Bank. Interestingly, the acquisition ban applied to the Clean Bank (which was taken over by another bank), but *only in case it was managed as a stand-alone unit*. See: Banif, SA.43977, 21 December 2015, Annex I point 14.
133. Banco CAM, SA.34255, 30 May 2012, para. 171 and annex point ix; BPN, para. 91, 236 and 269. The acquisition ban in the case of Banco CAM entailed that the combined entity (consisting of Banco Sabadell – Banco CAM) would not carry out any non-organic growth in the core regions of Banco CAM. The acquisition ban thus had a limited geographic scope, because acquisitions outside Banco CAM's core regions were still allowed.

13.9.3.1 Duration of the acquisition ban

In most cases, the acquisition ban applies for the duration of the restructuring period (which is usually 3 years). In some decisions, it is provided that the restructuring period ends on the date at which the State aid has been repaid in full. While there are thus some differences in the duration of the acquisition ban, the differences in the scope and exemptions are much more poignant.

13.9.3.2 Scope of the acquisition ban

Most acquisition bans entail that the beneficiary bank shall not acquire *any stake in any undertaking*. Two elements are of importance here: “any stake” and “any undertaking”.

With respect to the element of “any undertaking”, it should be pointed out that, while most acquisition bans prohibit the acquisition of stakes in any undertaking, there are some acquisition bans that only concern the acquisition of *financial* undertakings. The scope of those acquisition bans is thus somewhat limited.

Also with respect to the element of “any stake”, the scope of the acquisition ban can differ. In most cases, the beneficiary bank is prohibited from acquiring any stake. But in some cases, the beneficiary bank may acquire small stakes. For instance, Ethias committed not to acquire *more than 5%* of the capital of other credit institutions or investment firms.[134] The acquisition bans in the cases of Fortis and KBC are quite remarkable, since these banks were refrained from acquiring *control*, as defined by the EC Merger Regulation[135], of other financial institutions.

13.9.3.3 Exemptions to the acquisition ban

The restructuring plan may allow for certain exemptions to the acquisition ban. In that regard, it should be noted that point 47(f) of the 2013 Banking Communication provides for three exemptions to the acquisition ban. Although point 47 of the 2013 Banking Communication introduces measures preventing the outflow of funds *prior to a restructuring decision*, these three exemptions also appear in many restructuring decisions.

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134. Similarly, ATE would refrain from acquisitions of stakes in any other undertaking *of more than 5%.*
135. Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

The acquisition ban imposed on the National Bank of Greece (NBG) may serve as an illustration. The modalities of the acquisition ban can be found in the annex of the Restructuring Decision. The acquisition ban with its exemptions is formulated as follows:

> "Acquisition ban: The Hellenic Republic commits that the Bank shall not acquire any stake in any undertaking, be it an asset or share transfer. That ban on acquisitions covers both undertaking which have the legal form of a company and any package of assets which forms a business.
>
> i. Exemption requiring Commission's prior approval: Notwithstanding that prohibition, the Bank may, after obtaining the Commission's approval, and, where appropriate, on a proposal of the HFSF, acquire businesses and undertakings if it is in exceptional circumstances necessary to restore financial stability or to ensure effective competition.
> ii. Exemption not requiring Commission's prior approval: The Bank may acquire stakes in undertakings provided that:
>   a. The purchase price paid by the Bank for any acquisition is less than [[…]%] of the balance sheet size of the Bank at the Effective Date of the Commitments; and
>   b. The cumulative purchase prices paid by the Bank for all such acquisitions starting with the Effective Date of the Commitments until the end of the restructuring period, is less than [[…]%] of the balance sheet size of the Bank at the Effective Date of the Commitments.
> iii. Activities not falling under the acquisition ban: The acquisition ban shall not cover acquisitions that take place in the ordinary course of the banking business in the management of existing claims towards ailing firms."

The first exemption
The first exemption recognises the fact that there may be situations in which an acquisition may be highly desirable. This exemption makes the ban more flexible, because it allows the Commission to grant an exemption in case of exceptional circumstances. It could, however, be asked whether the Commission is the right authority to judge on these matters. Would a financial supervisory authority not be better placed to judge on the issue of financial stability?

This exemption was actually applied in several Greek banking cases. As set out in section 11.11, each of the four large Greek banks[136] acquired some smaller banks. The Commission assessed whether these acquisitions were compatible with the Restructuring Communication. This assessment concerned the effect of the acquisitions i) on the viability of the bank, ii) on the aid amount needed by the bank, and iii) on competition.

136. i.e. Alpha Bank, Piraeus Bank, Eurobank and NBG.

With respect to the effect of the acquisitions on the amount of aid needed by the bank, the reasoning of the Commission was as follows. The Commission first recalled that point 23 of the Restructuring Communication required that State aid should not be used for the acquisition of other companies but merely to cover restructuring costs which are necessary to restore the viability of the bank. The Commission then remarked that, although the acquisition had positive implications for the bank's viability, the acquisition was not essential for the bank's viability. However, the Commission went on to consider that the purchase price was very low. The purchase price was therefore not financed through State aid. That fact also implies that the payment of the purchase price did not create any capital need for the acquiring bank.[137]

With respect to the assessment of the distortive effects of the acquisition on competition, points 39-41 of the Restructuring Communication are of importance. The structure of these points is as follows: points 39 and 40 contain a prohibition, whereas point 41 contains an exemption to this prohibition.[138] In particular, point 41 provides that *in exceptional circumstances*, acquisitions may be authorised by the Commission where they are part of a consolidation process necessary to restore financial stability or to ensure effective competition.

An illustration of those exceptional circumstances can be found in the decisions on Alpha Bank, Eurobank, Piraeus Bank and NBG.[139] In these decisions, the following exceptional circumstances were mentioned:

- The Bank of Greece considered the three Cooperative Banks *not to be viable*. The acquisition could therefore be considered to be part of a *consolidation process*.
- *No non-aided bidder submitted any valid bid* to acquire the assets and liabilities of the three Cooperative Banks, and the only other bid came from a bank which had received even more aid. This circumstance led to the conclusion that there was no crowding-out of non-aided investors. This underlines the Commission's intention to ensure that the acquisition process respects the principle of equal opportunities.[140]
- The purchase price paid for Citibank Greece was extremely low and Alpha Bank *raised a large amount of private capital*.[141] This circumstance led to the conclusion that no aid was used to finance the acquisition.
- The size of the acquired assets and liabilities was small, and did not change the market structure.

137. Alpha Bank, SA.34823, 9 July 2014, para. 227.
138. Point 39 stipulates that State aid should not be used to the detriment of non-aided competitors. Point 40 stipulates that banks should not use State aid for the acquisition of competing businesses.
139. See also Panellinia Bank, SA.41503, 16 April 2015, para. 91-110.
140. See point 41 of the Restructuring Communication.
141. Alpha Bank, SA.34823, 9 July 2014, para. 257.

It should be noted that the exceptional circumstances are not cumulative criteria. For instance, the fact that the bank raised a large amount of private capital was not present in every case.

The second exemption

The second exemption concerns relatively insignificant acquisitions. Those acquisitions are exempted without requiring the Commission's prior approval. This makes sense, because if the Commission would have to investigate those acquisitions, then this leads to extra administrative costs (which would probably not outweigh the benefits of the investigation).

It is useful to point out that there is a relation between this second exception and the scope of the acquisition ban: if the acquisition ban is very limited in scope (such as in the case of Fortis and KBC), there is less need to make an exemption for small acquisitions.

The third exemption

The third exemption[142] concerns acquisitions that belong, in terms of the management of existing obligations of customers in financial difficulty, to a bank's normal ongoing business.[143] This concerns shareholdings managed or acquired in the course of the bank's normal business operations in connection with non-performing loans or similar banking operations.[144] In one of its decisions, the Commission explained the rationale of this exemption: "When banks are faced with bad loans in their loan portfolio, the restructuring of those loans sometimes requires solutions such as converting debt into equity. Those situations are considered to be normal banking practice and are not covered by the acquisition ban".[145]

Other exemptions

In addition to the three main exemptions, there are some other exemptions to the acquisition ban. In several cases, disposals and restructuring *within the group* do not fall under the acquisition ban.[146] Also the take-up of capital increases by the beneficiary bank *in its current holdings* pro rata to its current participation is sometimes excluded from the acquisition ban.[147]

142. Regarding the term "exemption", it could be argued that acquisitions that take place in the ordinary course of the banking business are not an exemption to the acquisition ban, but rather activities that do not fall under the scope of the acquisition ban. For instance, in Alpha Bank, annex point 28, the first two exception to the acquisition ban are listed under the heading "exemptions" while the third exception is mentioned under the heading "activities not falling under the acquisition ban".
143. See, for instance: OVAG.
144. See, for instance: HGAA.
145. ABN AMRO, C11/2009, 5 April 2011, footnote 120.
146. This was the case in: Commerzbank, HRE, Abanka, NKBM, NLB.
147. This was the case in: BAWAG, ATE.

Consistent application?

The table in Annex X gives an overview of all the cases that are characterised by the commitment to comply to an acquisition ban. In addition, the table shows the scope of the acquisition ban and the exemptions to the acquisition ban. The table shows an interesting picture: the three exemptions are not included in every case. Of the 57 decisions that imposed an acquisition ban, 23 of them did not include the first exemption. The second and third exemption were missing in 22 respectively 21 cases.

The general picture that emerges is that an acquisition ban is standard practice, whilst the exact modalities of the acquisition ban are deviating. It should be noted that the modalities of the acquisition ban are usually to be found in the annex of the decision. The exemptions to the acquisition ban are thus not mentioned in the recitals of the decision. Consequently, any explanation as to the reason why certain exemptions are (or are not) included, is completely lacking in the Commission decisions.

It is worth stressing that the picture would be completely different if only the decisions taken after the 2013 Banking Communication are included in the analysis (thus excluding the decisions that were taken before the 2013 Banking Communication). Indeed, point 47(f) of the 2013 Banking Communication provides for the three main exemptions. As a result, nowadays, every acquisition ban includes the three main exemptions.

13.9.4 Concluding remarks

The relevance of the acquisition ban was set out in subsection 13.9.1. Requiring an acquisition ban is standard practice of the Commission. Apart from a few outliers[148], there is no inconsistency in that regard (see subsection 13.9.2).

With respect to the elaboration of the acquisition ban, subsection 13.9.3 has shown that the modalities of the acquisition ban differ among the cases. Nevertheless, in every case that was characterised by an acquisition ban, the Commission welcomed the fact that there was an acquisition ban, even though the scope of the acquisition ban and the exemptions to the acquisition ban were different. In my view, the principle of equal treatment does not require that all the modalities of the acquisition ban should be the same in each case. However, it does require that the Commission should take into account the relevant differences between the cases. Thus, if cases differ on the modalities, then one would expect that these differences are taken into account by the Commission. In particular, one would expect some kind of justification or explanation why the scope of the acquisition ban is different or why some exemptions are not included. Such explanation is not given by the Commission in its decisional

148. i.e. the cases of Banco CAM and BPN.

practice. Most decisions only mention that the Commission welcomes the acquisition ban, without taking into account the different modalities of the acquisition ban.

Thus, the fact that the bank is subject to an acquisition ban is a relevant characteristic, but this relevant characteristic is not consistently elaborated in the decisions. However, the adoption of the 2013 Banking Communication put an end to this inconsistency.

13.10 Price leadership ban and other pricing restrictions

* *The fact that the beneficiary bank is subject to a price leadership ban.*
* *The fact that the beneficiary bank is subject to other pricing restrictions.*

13.10.1 Why are these characteristics relevant?

Pricing restrictions prevent the bank from using State aid for anti-competitive market conduct.[149] The imposition of such restrictions is in line with point 44 of the Restructuring Communication which provides that State aid should not be used to offer terms which cannot be matched by competitors which did not receive State aid.

One of the most striking pricing restrictions is the price leadership ban. This ban clearly restricts the bank in its pricing behaviour, since it prohibits the bank from acting as price leader. There are also other pricing restrictions, such as the commitment to not issue loans with a return of less than x%. In this PhD-study, the pricing restrictions other than the price leadership ban are referred to as 'other pricing restrictions'.

13.10.2 Has the Commission consistently taken into account these relevant characteristics?

The analysis of the Commission decisions reveals that of all the bank State aid cases, only in 13 cases a price leadership ban was imposed.[150] In most of the other bank State aid cases, the beneficiary bank was subject to other pricing restrictions. The table in Annex XI gives an overview of the cases that are characterised by a price leadership ban or other pricing restrictions.

149. Pricing restrictions can concern both deposit-taking and the granting of loans and credit.
150. The following banks were subject to a price leadership ban: Fortis, Commerzbank, Northern Rock (with respect to BankCo), ING, KBC, LBBW, Aegon, Sparkasse KölnBonn, ABN AMRO, OVAG (with respect to Livebank), Hypo Tirol, DMA (Dexia), FIH.

What is most striking, is that there are only 16 decisions in which the Commission assessed the need for a price leadership ban: in 13 cases, a price leadership ban was imposed; while in 3 cases, a price leadership ban was contemplated.[151] Why only in these 16 cases?

As to the question why a price leadership ban was needed, most of the 16 decisions contain some very general considerations. These considerations usually entail that the price leadership ban prevents the bank from growing at the expense of its rivals[152], or that it ensures that the aid is not used to finance a pricing strategy which cannot be met by other market players competing on their own merits[153] and that it ensures that the bank can only attract new customers on the strength of the quality of the products and services it offers.[154] In some decisions, a more specific reason for the price leadership ban can be found. These will be discussed below.

Aggressive commercial behaviour

The decision on AEGON contained some interesting considerations with respect to the price leadership ban. The Commission noted that AEGON had been one of the price leaders on the Dutch mortgage and savings market in the period after the capital injection by the State. The Commission also observed that AEGON increased its market share in mortgages throughout 2009. The Commission considers that *past pricing practice of AEGON amounted to aggressive commercial behaviour*. Against this background, the Commission considered that a price leadership ban seemed to be an appropriate measure to avoid in the future distortions of competition on the Dutch mortgage and savings markets.[155]

The argument concerning the (aggressive) market behaviour of the beneficiary bank was also used in the Opening Decision in the case of Proton Bank. Since Proton Bank was a very small bank, the distortions of competition could be considered as limited. However, the market behaviour of Proton Bank was characterised by offering interest rates on deposits which were much higher than the interest rates offered by most competitors. The Commission therefore took the view that a price leadership ban had to be contemplated.[156]

151. A price leadership ban was contemplated in the Opening Decisions on TT Hellenic Postbank and Nea Proton Bank. Eventually, both banks were taken over by Eurobank. See: Eurobank, 29 April 2014, para. 155 and 397. See also: TT Hellenic Postbank, 6 May 2013, para. 107; Nea Proton Bank, 26 July 2012, para. 83.
152. Commerzbank, N244/2009, 7 May 2009, para. 111.
153. Ethias, N256/2009, 20 May 2010, para. 144.
154. Commerzbank, N244/2009, 7 May 2009, para. 111.
155. Aegon, N372/2009, 17 August 2010, para. 116.
156. Nea Proton Bank, SA.34488, 26 July 2012, para. 83. In the end, this was overtaken by events, as Proton Bank was taken over by Eurobank. See also: TT Hellenic Postbank, SA.31155, 6 May 2013, para. 107.

Other specific circumstances of the case

Another decision that contained some interesting considerations was the decision on the Austrian OVAG. The price leadership ban of OVAG was due to the specific circumstances of that case. As touched upon in section 11.6.3.2, OVAG was heavily reliant on wholesale funding. The acquisition of Livebank by OVAG gave OVAG access to EUR 470 million of retail funding. The Commission noted positively that the acquisition reduced OVAG's past reliance on wholesale funding.[157] However, in order to prevent that State aid would be used to fund anti-competitive behaviour, a price leadership ban was deemed necessary. In footnote 64 of the decision, the Commission added that Livebank was the only part of OVAG's business that was taking deposits. Hence, the price leadership ban was only necessary with respect to that market segment and not to other markets.

The price leadership ban in the case of the Danish bank FIH had a very specific background. The Commission noted that "FIH intended to aggressively enter the internet retail deposit market by pursuing a 'price leadership' role. That entry into the internet retail deposit market was a core component of FIH's strategy to address its funding problems".[158] In the Opening Decision, the Commission expressed its doubts. Denmark therefore provided a commitment that FIH would adhere to a price leadership ban for deposits if the market share of FIH exceeded 5%. The Commission welcomed this commitment, because it allowed FIH to further improve its funding position by raising deposits on the market while at the same time establishing a threshold preventing excessive practices.[159]

Structural remedies

An interesting aspect of the price leadership ban of the Belgian bank KBC was that it did not apply to Belgium. As set out in section 13.5, KBC had committed to divest Centea and Fidea. The Commission concluded that these were structural remedies which would lead to improved competition on the Belgian market.[160] The Commission considered that a price leadership ban may not be necessary in markets where significant pro-competitive structural commitments have been provided.[161] Thus, to some extent, structural measures and behavioural restrictions are 'communicating vessels'. In this context, it should be stressed that the structural remedies in the case of KBC were *pro-competitive*. Centea and Fidea were to be divested with the aim of creating challenger banks.

157. OVAG, SA.31883, 19 September 2012, para. 48 and 103.
158. FIH, SA.34445, 11 March 2014, para. 33.
159. FIH, SA.34445, 11 March 2014, para. 137.
160. KBC, C18/2009, 18 November 2009, para. 181.
161. See also: point 44 of the Restructuring Communication.

Other pricing restrictions

Sometimes, an outright price leadership ban can give rise to implementation problems. This was the case with Ethias, an insurance company. The Commission noted that insurance products are standardised only to a limited extent and that a price leadership ban would be too difficult to implement.[162] A price leadership ban was therefore not imposed. However, Ethias was subject to a different type of pricing restriction.[163]

Can the absence of the price leadership ban be justified by the presence of other pricing restrictions? This is only the case if the price leadership ban and the other pricing restrictions are alternatives (or substitutes) to each other. Whether this is the case depends on the way how the price leadership ban and the other pricing restrictions are elaborated. To that end, the modalities of the price leadership ban are discussed in subsection 13.10.3, while the other pricing restrictions are set out in subsection 13.10.4.

13.10.3 How is the price leadership ban elaborated in the decisions?

The price leadership ban in the case of ING may serve as an illustration of how a price leadership ban can be formulated:

> "Without prior authorization of the Commission, ING will not offer more favourable prices on standardized ING products (on markets as defined below) than its three best priced direct competitors with respect to EU-markets in which ING has a market share of more than 5%".[164]

The price leadership ban in the case of ING also illustrates the various modalities of a price leadership ban. The modalities concern the *relevant market* ("standardized ING products") and a *threshold* ("market share of more than 5%"). Another modality of great importance is the *standard of comparison* ("its three best priced direct competitors").

Not all price leadership bans are formulated in this way. On the contrary, in each case, they are formulated differently: the specific modalities of the price leadership ban differ among the 13 cases in which the price leadership ban was imposed.

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162. Ethias, N256/2009, 20 May 2010, para. 144.
163. Ethias, N256/2009, 20 May 2010, para. 144. See Ethias, N256/2009, 20 May 2010, footnote 10.
164. ING, C10/2009, 18 November 2009, para. 84.

Relevant market
This modality is sometimes elaborated. This can be illustrated by the case of KBC. As set out in subsection 13.10.2, the price leadership ban in the case of KBC did not apply to the Belgian market. This was explained by the fact that significant pro-competitive structural commitments had been provided: KBC would divest Centea and Fidea, which would lead to improved competition on the Belgian market.

Threshold
A price leadership ban is usually limited to markets where the bank has a significant presence (i.e. at least 5%). However, the Commission imposed a price leadership ban on ING Direct Europe, *regardless of its market share*. According to the Commission, this was justified because it had received information alleging that ING Direct Europe had engaged in aggressive commercial behaviour.[165]

Standard of comparison
The finding that the modalities differ among the bank State aid cases is most notable with respect to the standard of comparison. Some price leadership bans stipulate that the bank may not offer more favourable rates than its *cheapest or best priced) competitors*[166], and some price leadership bans stipulate that the bank may not offer more favourable rates than its *largest competitors*[167]. Sometimes, it is a combination ("the best priced competitor among the top 10 market players").[168] In addition, the number of competitors that are included in the standard of comparison differs.

Given these differences, one would expect that the Commission decisions provide some explanation as to why a certain standard of comparison is chosen. This is, however, not the case. The Commission decisions do contain some considerations with respect to the question why a price leadership ban was needed, but the standard of comparison is usually not elaborated in the decisions.

Consistent application?
In the section that discussed the acquisition ban, it was remarked that the Commission should take into account the different modalities of the acquisition ban. In the same vein, the Commission should take into account the different modalities of the price leadership ban. To some extent, this is done by the Commission. Indeed, the decisions usually contain some explanation regarding the relevant market and the threshold. However, the standard of comparison is not

165. ING, C10/2009, 18 November 2009, para. 5 and 150.
166. This is the case for Commerzbank, ING, AEGON, Livebank, Hypo Tirol.
167. This is the case for ABN AMRO, Fortis.
168. This is the case for LBBW, Sparkasse KölnBonn, KBC.

explained in the decisions. As shown in the present section, the price leadership bans differ with respect to the standard of comparison.[169] Not taking into account these differences would – in my opinion – amount to an inconsistency.

What are the implications of this finding? Normally I would expect the Commission to take action in order to remedy an inconsistency. However, since it appears that the Commission no longer requires a price leadership ban, the finding that the Commission did not take into account certain differences in the modalities, has lost its relevance for future cases. In that regard, it should be recalled that – even though the method of this PhD-study is backward-looking – its ultimate aim is forward-looking.

13.10.4 How are the other pricing restrictions elaborated in the decisions?

The price leadership ban was imposed in only 13 cases. However, most of the other bank State aid cases are characterised by other pricing restrictions. For instance, Dexia, KA Neu and HRE committed that they would not issue new loans with a risk-adjusted return on capital (RAROC) of less than 10%.[170] This minimum pricing on new loans prevented those banks from applying rates which were below market rates.

In the same vein, the Slovenian banks Abanka, NKBM and NLB also committed to pricing restrictions. These banks committed to price their loans in such a way that they would achieve a return on equity (RoE) of at least […]% on each client relationship. As a result, Abanka, NKBM and NLB would refrain from providing excessively advantageous conditions to their clients. The Commission noted that this pricing commitment would not only contribute to the restoration of viability, but also to limiting competition distortions.[171]

Not only beneficiary banks that continue as a standalone entity (C-context) have to respect some behavioural constraints, also banks that are in the process of being wound-down (W-context) sometimes have to comply with certain behavioural restrictions. In that regard, point 75 of the 2013 Banking Communication stipulates that the pricing policy of banks to be wound-down must be designed *to encourage customers to find more attractive alternatives*.[172] The

169. This has also been remarked in the literature. Lyons & Zhu performed a case study in which they examined the cases of Northern Rock, WestLB, Fortis and Lloyds Banking Group. With respect to the compensatory measures, Lyons & Zhu (2013, p. 62 and 64) concluded that the behavioural measures on pricing were imposed *without a clear pattern*.
170. Dexia, 26 February 2010, para. 212; KA, 31 March 2011, para. 34; HRE, 18 July 2011, para. 129.
171. Nova Ljubljanska banka (NLB), 18 December 2013, para. 167; Abanka, 13 August 2014, para. 153; Nova Kreditna Banka Maribor (NKBM), 18 December 2013, para. 147 (and 104).
172. For instance, Factor Banka and Probanka are two Slovenian banks that were wound-down. In accordance with point 75 of the 2013 Banking Communication, they committed that their prices would be aimed at encouraging customers to find more attractive alternatives.

pricing restrictions can also be found in decisions taken before the adoption of the 2013 Banking Communication. For instance, under the Danish winding-up scheme, the bank would have to pursue a pricing policy designed to encourage customers to find more attractive alternatives.[173]

A key observation is that these pricing restrictions are *formulated differently*. Some decisions refer to the RAROC, whilst others refer to the RoE. Sometimes, the pricing restrictions are formulated as a commitment to lend at sufficiently high margins[174] or as a commitment not to price deposits above market average or to grant loans below market average.[175]

13.10.5 Concluding remarks

The relevance of the price leadership ban was explained in subsection 13.10.1. As regards the elaboration of the price leadership ban, subsection 13.10.3 discussed that the modalities of the price leadership ban often differ. This is not problematic, as long as the Commission takes into account the differences in modalities. To some extent, the Commission has done this. However, with respect to the standard of comparison, an explanation as to why a specific standard of comparison was chosen, was completely lacking.

An even greater issue is the fact that the price leadership ban only appears in a handful of cases (see subsection 13.10.2). Can the absence of a price leadership ban be explained by the fact that the bank is subject to the other pricing restrictions? In my view, this question should be answered in the negative, because there is an important difference between the price leadership ban and the other pricing restrictions. The price leadership ban is exclusively aimed at

This was specified as follows: "(i) the level of the interest rate/fee paid by the Bank to customers should be below the average of the market and (ii) the level of the interest rate/fee paid by customers to the Bank should be above the average of the market. Not more than 10% of products offered by the Bank (in nominal amount) will deviate from this rule."

173. SA.33757, 9 December 2011, para. 72. This was specified as follows: the interest rates on loans should be within the top 10% band of the interest rates charged by the 30 largest Danish banks, while the interest rates on deposits should be within the bottom 10% ban of the rates offered by the 30 largest Danish banks. In the decision of 28 June 2011 (SA.33001), this is formulated as follows: the interest rates for loans should be placed above the 90%-quantile and the interest rates on deposits should be below the 10%-quantile. In the case of Fionia Bank and Amagerbanken, the Rump Bank respectively the New Bank had to comply with this pricing policy. Fionia Bank, N560/2009, 25 October 2010, para. 31-34; Amagerbanken, SA.33485, 25 January 2012, para. 59. See also: Roskilde Bank, NN52/2010, 24 May 2011 (amendment decision), para. 44.
174. ATE, N429/2010, 23 May 2011, para. 87.
175. Banco Espírito Santo (BES), SA.39250, 3 August 2014, para. 46; CCB, SA.35334, 24 February 2014, para. 166 and annex point 38.

limiting competition distortions, while the other pricing restrictions are also aimed at restoring the long-term viability of the bank. Thus, the price leadership ban and the other pricing restrictions are therefore not substitutes. This means that the absence of a price leadership ban cannot be explained by the mere fact that the bank is subject to the other pricing restrictions.

The price leadership ban is one of the most contentious behavioural restrictions. This compensatory measure has been heavily criticised in the literature. From this viewpoint, it might be a good thing that the Commission no longer requires a price leadership ban.

There are some cases in which there are no pricing restrictions at all. However, these cases are often characterised by a *ban on aggressive commercial practices*. To some extent, this ban is related to a pricing restriction, because this ban affects the pricing behaviour of the bank – depending on how this ban is interpreted. This behavioural restriction will be discussed in more detail in the following section.

13.11 Ban on aggressive commercial practices/strategies

* *The fact that the beneficiary bank is subject to a ban on aggressive commercial practices/strategies.*

13.11.1 Inconsistent use of these terms?

In many cases, beneficiary banks have committed not to engage in ‘aggressive commercial practices’ or ‘aggressive commercial strategies’. There is a lot of vagueness regarding the use of those terms. Sometimes, they are used as synonyms; sometimes they are used as two distinct notions.

Point 47 of the 2013 Banking Communication requires that certain banks “(e) must not engage in *aggressive commercial practices*”, and “(g) must refrain from advertising referring to State support and from employing any *aggressive commercial strategies* which would not take place without the support of the Member State”. The ‘practices’ and ‘strategies’ are mentioned in separate subparagraphs of point 47, which would imply that there is a difference between ‘practices’ and ‘strategies’.

The ban on aggressive commercial practices is not the same as an advertisement ban. This can be illustrated by recital 188 of the Restructuring Decision on Catalunya Banc, which mentions the advertisement ban and the ban on aggressive commercial practices as two separate behavioural restrictions.

In several other Commission decisions, the terms 'practices' and 'strategies' are used interchangeably. This can be illustrated by the decision on Nova Ljubljanska banka (NLB). In this decision, the Commission noted that "Slovenia also committed to a coupon ban, an acquisition ban and a ban on advertising and aggressive commercial *practices*".[176] So in the considerations of the decision, the term 'practices' is used. Nevertheless, the annex speaks about 'strategies'. Under the heading "bans on advertising and aggressive commercial *strategies*", Slovenia committed "to impose a ban on advertising related to the state support to NLB and to the state ownership in NLB (or to any competitive advantages arising in any way from the aid to NLB or the state ownership in NLB) and to prevent NLB from employing any aggressive commercial *strategies* which would not be pursued without state support (advertisement ban)".[177]

To conclude, there is a lot of vagueness surrounding the terms 'aggressive commercial strategies'. To compound on that vagueness, there are a few decisions that use even other terms. For instance, FHB committed that it would not follow any aggressive *business* strategy.[178] In the decision on MPS 'aggressive pricing strategy' and 'aggressive commercial strategy' are used as synonyms.[179]

13.11.2 A price leadership ban in disguise?

In addition, it is not entirely clear what is understood by "aggressive commercial practices". This notion is not defined or explained. Only in the decisions on the Spanish banks, the notion of "aggressive commercial practices" is elaborated:

> "Banco Mare Nostrum (BMN) *shall avoid engaging in aggressive commercial practices* throughout the duration of the Restructuring Period. To that end, BMN shall make sure that the nominal interest rate offered to clients on its products *must be less attractive than* the average of the most competitive rates offered on analogous products by the five main non-aided competitors within the geographical area where BMN operates in the core regions. To this end, BMN will operate in conformity with the restrictions approved by the Board of the FROB on 22 December 2010".[180] [Italics mine, *REvL*]

176. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 158. See also para. 169.
177. Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, annex 12.1.
178. FHB, C37/2010, 22 February 2012, para. 92.
179. Banca Monte dei Paschi di Siena (MPS), SA.36175, 27 November 2013, para. 74 and 156.
180. Banco Mare Nostrum, SA.35488, 20 December 2012, annex point 7.6. See also: Catalunya Banc, 28 November 2012, annex point 7.6; BFA Bankia, 28 November 2012, annex point 7.6;; NCG, 28 November 2012, annex point 7.2. NB: the ban on commercial aggressive practices is not specified in the decision on Liberbank.

This description of the ban on aggressive commercial practices resembles the description of the *price leadership ban*. This would imply that these two behavioural restrictions are the same. However, this is in sharp contrast with the decisions that include a price leadership ban as well as a ban on aggressive commercial practices.[181]

13.11.3 Concluding remarks

The present section has shown that there is much vagueness regarding the ban on aggressive commercial practices and/or strategies. In my opinion, this should be clarified by the Commission.

13.12 Exit from State aid

* *The fact that the beneficiary bank pays back the State aid (as quickly as possible).*

* *The fact that the Member State commits to reprivatize the beneficiary bank.*

13.12.1 Why are these characteristics relevant?

It is perhaps fitting that the final relevant characteristic discussed in this chapter (and in this PhD-study) is about exit from State aid. Exit from State aid means that the beneficiary bank should not remain dependent on State support. This is relevant for two reasons. In the first place, beneficiary banks should return to long-term viability. Long-term viability means that the bank is able to survive without State support. In the second place, as long as the bank enjoys State support, there is a distortion of competition. It is therefore welcomed by the Commission if the beneficiary bank can present a clear exit strategy.

How to achieve an exit from State aid? The exit strategy depends on the type of State aid measure. Exit from a guarantee simply ends when the guarantee expires. Exit from State aid in the form of preference shares, CoCo's or other (hybrid) debt instruments is achieved when the beneficiary bank fully repays the aid amount.[182] The fact that the beneficiary bank pays back the State aid (as quickly as possible) is thus a relevant characteristic.

181. See, for instance: FIH, SA.34445, 11 March 2014, para. 137.
182. Another option is that the bank pays a remuneration for the aid that is completely in line with normal market conditions. See point 14 of the Restructuring Communication.

Repayment of State aid is not the only way of exit from State aid. Indeed, if State aid is granted not in the form of debt instruments, but in the form of ordinary shares, then this aid cannot be repaid by the bank.[183] During the financial crisis, several Member States decided to nationalise failing banks. The aim of the nationalisation was to rescue the bank; the intention was not to hold the shares in the bank indefinitely. At some point in time, the bank will be brought back to the market. The fact that the Member State has committed to reprivatize the beneficiary bank can be found in several cases. This commitment is viewed positively by the Commission. However, it should be kept in mind that the TFEU takes a neutral position towards private and State property.[184] Member States are thus not obliged to reprivatize the bank.

The relevance of reprivatisation is illustrated by the following recital from the decision on ABN AMRO:

> "Moreover, given the repeated and massive intervention of the Dutch State in favour of Fortis Bank S.A., FBN and ABN Amro N, the public, and depositors in particular, might consider that the State will intervene again if further difficulties occur. *Consumers might perceive the new entity ABN Amro Group to be a very safe bank, which might make it easier for the group to collect deposits.* The Dutch government apparently wants to end this distortion of competition by selling the group to private investors as soon as this is practically feasible".[185] [Italics mine, *REvL*]

This recital illustrates that it may be easier for a bank in State ownership to attract retail deposits, because depositors are aware that the bank is State-supported. Reprivatisation will end this distortion of competition. Reprivatisation may be relevant for two other reasons. Firstly, it will allow the Member State to recover (part of) the funds invested in the beneficiary bank.[186] Furthermore, as set out in section 11.3.3.2, the Commission does not always welcome State involvement in the bank's management. From that viewpoint, the commitment to reprivatize the bank will be noted favourably by the Commission. To give an example: the Slovenian State became sole shareholder of Abanka, NKBM and NLB as a result of the capital injections. Slovenia

183. This was explicitly recognised by the Commission in its decision on ABN AMRO, C11/2009, 5 April 2011, para. 312: "While part of the aid has already been redeemed, some measures (in particular measures Z and C) cannot be redeemed by the bank due to the form in which they were granted (i.e. not in the form of a hybrid debt instrument)."
184. This principle is enshrined in Art. 345 TFEU (previously Art. 295 EC).
185. ABN AMRO, C11/2009, 5 February 2010, para. 139. See also: Northern Rock, C14/2008, 28 October 2009, para. 162.
186. This reason was explicitly mentioned in the decision on HRE (C15/2009, 18 July 2011, para. 131).

committed to divest (part of) its shareholdings in these banks. This commitment was welcomed by the Commission, because the divestment would reduce the external influence in the banks' management and business activities.[187]

13.12.2 Has the Commission consistently taken into account these relevant characteristics?

The strategy to exit from State aid is usually mentioned in the bank State aid decisions, although the Commission does not frequently use the term "exit strategy"; more often, the specific terms 'reprivatisation' and 'repayment' are used.

In addition, it is noteworthy that the exit strategy is not always mentioned in the same part of the decision. In some decisions, it is mentioned in the description of the restructuring plan; while in some other decisions, it is mentioned in the assessment of whether the aid is limited to the minimum (i.e. the second pillar). There are also decisions in which the exit strategy is addressed in the context of competition distortions (i.e. the third pillar). In some decisions, the exit from State aid is mentioned twice. For instance, in the decision on BPI, the Commission noted that "such repayment of the aid ensures that the aid is *limited to the minimum necessary*"[188] and that "BPI has already repaid more than one-third of the total aid amount which is an important contribution *to limit potential distortions of competition*".[189]

13.12.3 How are these relevant characteristics elaborated in the decisions?

13.12.3.1 Reprivatisation

When the Member State has nationalised the bank, the exit from State aid is achieved by a reprivatisation. A reprivatisation *can be conducted in different ways*. In that regard, Member States usually commit to sell the bank in an open and transparent tender.[190] There are a few cases in which the Member State committed that the bank would be listed.[191]

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187. Nova Kreditna Banka Maribor (NKBM), SA.35709, 18 December 2013, para. 107 (in the section "strengthening the corporate governance framework"), and annex 12; Nova Ljubljanska banka (NLB), SA.33229, 18 December 2013, para. 131.
188. BPI, SA.35238, 24 July 2013, para. 89.
189. BPI, SA.35238, 24 July 2013, para. 92.
190. See, for instance: Kommunalkredit Austria (KA), SA.32745, 31 March 2011, para. 34b and annex B.
191. See, for instance: Banco Mare Nostrum (BMN), SA.35488, 20 December 2012, para. 142.

One of the most important modalities of a reprivatisation is the *timeframe*. In some cases, the Member State committed to reprivatize the bank before a certain date. In other words: there is a clear timeframe in these cases.[192] By contrast, in the case of SNS REAAL, the Dutch State did not commit to reprivatize the bank within a certain timeframe. Rather, the Dutch State committed to regularly test the market conditions to reprivatize the bank.

The reprivatisation of the beneficiary bank is thus not always structured in the same way. However, it should be recalled that Member States are not obliged to reprivatize the beneficiary bank. As a corollary, Member States are not obliged to reprivatize the bank in a specific way. They have thus some flexibility in choosing how they reprivatize the bank.

13.12.3.2 Repayment of State aid

When the bank has been granted support in the form of preference shares, CoCo's or other (hybrid) debt instruments, the exit is achieved by repayment of these instruments. In that regard, three remarks are in order.

In the first place, it should be recalled that the Commission welcomes *exit incentives*. As discussed in section 8.7, a step-up clause in the remuneration may induce the bank to pay back capital to the State as quickly as possible. Exit incentives thus contribute to an early repayment.

In the second place, the Commission welcomes a *clear repayment schedule*.[193] This can be illustrated by the case of Banco Comercial Português (BCP). This bank had committed to a "rigorous" repayment schedule of the CoCo's, which was noted favourably by the Commission.[194]

In the third place, the Commission welcomes an *early repayment* of the State aid. This can be illustrated by the case of FHB (a Hungarian bank). FHB was recapitalised by the Hungarian State on 23 March 2009. On 19 February 2010,

192. The implications of a strict timeframe can be illustrated by the case of KA. Austria had committed to sell all the KA Neu shares before a specific date. The privatisation of KA Neu failed within the stipulated timeframe. Consequently, KA Neu was put in run-off.
193. Point 45 of the Recapitalisation Communication requires a timetable for redemption of State participation.
194. Banco Comercial Português (BCP), SA.34724, 30 August 2013, para. 106. The repayment mechanism in the case of BCP was combined with a contingent divestment. BCP committed to divest its Polish subsidiary if it did not repay by 31 December 2016 a substantial amount of the State aid. This commitment was noted favourably by the Commission.

the capital injected by the State was already repaid. This early repayment of State aid was viewed favourably by the Commission.[195] FHB also benefited from a State loan. At the time of the Restructuring Decision, FHB had already paid back four instalments of the loan, a fact which was noted favourably by the Commission.[196] The early repayment – together with the fact that FHB had a small market share in the retail and corporate deposits market – led the Commission to conclude that the distortions of competition were limited.[197]

To conclude, exit incentives, a clear repayment schedule or an early repayment are noted positively by the Commission, because these factors ensure an exit from State aid.

13.12.4 Concluding remarks

This section has shown that the exit strategy is not always structured in the same way. However, it should be stressed that it is for the Member State and beneficiary bank to develop an exit strategy; the Commission only assesses whether there is a clear exit strategy. The important thing is that the Member State can demonstrate a convincing exit strategy.

13.13 Conclusion

In each bank State aid case, the Commission assesses whether the compensatory measures are sufficient to mitigate possible distortions of competition. The characteristics that are relevant to that assessment were identified and discussed in the present chapter. What are the main findings and what are their implications for the Commission on the one hand and the Member States and beneficiary banks on the other hand?

13.13.1 Key findings

The key findings concern *the relevant context* and the inconsistencies.

The relevant context

The Commission assesses whether the compensatory measures are sufficient to mitigate possible distortions of competition. As set out in the present chapter, the starting point of this assessment is the relevant context. The Commission does not use the term ‘context’, but it does take into account the fact that the bank is being wound-down (W-context), taken over by another bank (T-context)

195. FHB, C37/2010, 22 February 2012, para. 79, 82 and 94.
196. FHB, C37/2010, 22 February 2012, para. 84.
197. FHB, C37/2010, 22 February 2012, para. 94.

or split-up (S-context). In these contexts, the beneficiary bank disappears as a standalone entity. This is considered by the Commission as a significant compensatory measure.

Inconsistencies

This chapter has found several inconsistencies in the Commission's decisional practice. The most conspicuous ones will be highlighted below.

In the first place, the present chapter has shown that two compensatory measures were required by the Commission in the early bank State aid cases. The Commission required a specific type of divestment, namely a divestment aimed at creating a new competitor. Furthermore, the Commission required that the beneficiary bank would be subject to a price leadership ban. As explained in sections 13.5 and 13.10, these two compensatory measures do not appear in later bank State aid cases. Does this constitute a change of approach? This could have been better explained or clarified by the Commission.

In the second place, the present chapter has shown that the balance sheet reduction is elaborated inconsistently. Firstly, the percentage of the balance sheet reduction is not always mentioned in combination with the relative aid amount. Secondly, in some decisions, the emphasis is on the way how the balance sheet reduction is achieved (i.e. which activities are divested), while in other decisions, the emphasis is on the percentage of the balance sheet reduction.

In the third place, the Commission did not always take into account the modalities of some behavioural restrictions. For instance, the present chapter has highlighted that the Commission always welcomed an acquisition ban, without taking into account the modalities of the acquisition ban – which, in my opinion, amounts to an inconsistency.

13.13.2 Implications for the Commission

This chapter has found several inconsistencies in the Commission's decisional practice. Thus, at some points, action should be undertaken by the Commission. As regards several relevant characteristics, action is already undertaken by the Commission. Especially the adoption of the 2013 Banking Communication put an end to several inconsistencies.

13.13.3 Implications for the Member States and beneficiary banks

In future bank State aid cases, what can Member States and beneficiary banks expect from the Commission when submitting the restructuring plan? How to anticipate the Commission's assessment of the compensatory measures?

Competitive impact

Intuitively, the relative aid amount is one of the most important factors determining the extent to which compensatory measures are needed. This chapter has shown that the aid intensity is indeed a highly relevant characteristic. However, there are various compensatory measures and one cannot determine, on the sole basis of the aid amount, which compensatory measures are needed. In addition, there is no one-to-one relation between the relative aid amount and the extent of downsizing.

To some extent, the compensatory measures are related to the competitive impact of the aid. Nevertheless, some compensatory measures are always required by the Commission, *irrespective of the precise competitive impact*. The prime example is the acquisition ban. This compensatory measure is always required in cases in the C-context.

Some flexibility

Importantly, Member States have flexibility in deciding how they want to rescue and restructure the bank: by winding-down the bank (W-context), by breaking-up the bank (S-context), by transferring the bank to another bank (T-context) or by allowing the bank to continue as a standalone entity (C-context). It should be noted that the Commission does not impose one of the contexts.

To some extent, the compensatory measures are 'communicating vessels'. The more structural remedies, the less the need for behavioural restrictions. For instance, the price leadership ban in the case of KBC did not apply to the Belgian market, because KBC had committed to divest Centea and Fidea. In addition, the Commission takes into account the degree of burden-sharing.

As a result, Member States and beneficiary banks have some flexibility in choosing which compensatory measures they want to include in the restructuring plan. For instance, as set out in section 13.4, market-opening measures are not always required by the Commission.

Chapter 14. Conclusion

14.1 The aim of this PhD-study

Some beneficiary banks felt unjustly treated by the Commission. As explained in chapter 1, there is some doubt whether the principle of equal treatment is respected by the Commission in its bank State aid decisions. This doubt is caused by a *lack of clarity*. The aim of this PhD-study is to tackle this problem by providing some clarity. In other words: the purpose of this PhD-study is to find a way in which it can be assessed whether a bank State aid decision complies with the principle of equal treatment. The corresponding central research question is thus as follows:

How to assess whether a bank State aid decision complies with the principle of equal treatment?

The aim of this PhD-study is to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. As explained in chapter 6, this framework effectively consists of a list of relevant characteristics. In each bank State aid case, the Commission should take into account these relevant characteristics. Indeed, when these relevant characteristics are consistently taken into account by the Commission, then the decisional practice of the Commission complies with the principle of equal treatment. Thus, the only way of assessing whether a bank State aid decision complies with the principle of equal treatment is by checking whether the relevant characteristics are taken into account by the Commission. The list of relevant characteristics can serve as a 'check list', which can be used by the Commission as well as by the Member State and beneficiary bank.

While the aim of this PhD-study is forward-looking (i.e. providing a framework which can be used for *future* cases), the analysis is backward-looking (i.e. analysing *previous* bank State aid cases). The analysis of the previous decisional practice is relevant for future cases. In the first place, the list of the relevant characteristics is formed on the basis of the analysis of the decisional practice. In the second place, the analysis of the Commission decisions may reveal certain shortcomings in the decisional practice. Indeed, the analysis of the decisional practice has revealed that there are several relevant characteristics that are not consistently taken into account by the Commission. In future cases, extra attention should be paid to these relevant characteristics.

14.2 Key findings

14.2.1 The relevant context

One of the conclusions of this PhD-study is that the context matters. This PhD-study distinguishes between the following contexts: in the C-context, the beneficiary bank continues to exist as a standalone entity; in the W-context, the beneficiary bank is wound-down; in the T-context, the beneficiary bank is taken-over by another bank; in the S/C/W-context, the beneficiary bank is split-up in a good and bad part; and in the S/T/W-context, the beneficiary bank is split-up in a good part – which is transferred to another bank – and a bad part – which is wound-down.

It should be stressed that categorising bank State aid cases on the basis of the relevant context is not an end in itself; rather, it is a means to an end. The compatibility-assessment ultimately depends on the relevant characteristics. In that regard, the context is relevant, because it may have an impact on the relevant characteristics. The exact relevance differs per context, as will be explained below.

Relevance of the W-context

The defining feature of the W-context is that the beneficiary bank will be wound-down. Consequently, the beneficiary bank will eventually disappear from the market. This greatly limits the distortions of competition stemming from the State aid. Indeed, when the bank has exited the market, it can no longer distort competition on that market. Therefore, as discussed in section 13.1.2, the fact that the beneficiary bank will eventually disappear from the market is the starting point of the Commission's assessment of the compensatory measures.

Since the bank in the W-context will be wound-down, the restructuring measures in this context are not aimed at the restoration of the long-term viability of the bank. Accordingly, most of the characteristics that are relevant to the viability-assessment are less relevant in the W-context. Nevertheless, to some extent these characteristics may still be relevant, since the bank will *eventually* leave the market rather than *immediately*. In the meantime, some viability-measures might be useful.

Relevance of the T-context

The defining feature of the T-context is that the beneficiary bank's activities are transferred to the acquiring bank (and subsequently integrated into the acquiring bank). Since the transferred activities constitute an economic continuity, the Commission assesses how the transfer and subsequent integration of these activities contributes to the restoration of their viability. As discussed in section 11.10, the relevant criterion is that the acquiring bank should be viable and capable of absorbing the transfer of the ailing bank. In essence, the main reason to sell the beneficiary bank to a larger bank is to restore the viability of the beneficiary bank. Thus, the viability-elements (such as corporate governance, operation efficiency and funding) are assessed from the viewpoint of the take-over and subsequent integration into the acquiring bank.

Even though the transferred activities are considered to be an economic continuity, the beneficiary bank itself will cease to exist as a standalone entity. This is noted positively by the Commission, because this limits competition distortions.

Relevance of the S-context

The defining feature of the S-context is that the beneficiary bank is split-up in a 'good' part and a 'bad' part. This has important implications for the burden-sharing. As discussed in sections 12.5.3.4 and 12.6.3.2, in the S-context, the shareholders and subordinated debt holders usually remain at the 'bad' part of the bank. In this way, burden-sharing by shareholders and subordinated debt holders is 'automatically' achieved.

The S-context is also relevant with respect to the limitation of competition distortions, because the split-up of the bank means that the bank will cease to exist as a standalone entity. This is noted positively by the Commission (just like the exit of the bank is noted positively in the W-context and T-context).

Relevance of the C-context

The defining feature of the C-context is that the beneficiary bank continues to exist as a standalone entity. This differentiates the C-context from the other contexts discussed above. Since the beneficiary bank in the C-context does not cease to exist as a standalone entity, compensatory measures (such as downsizing) are very important in this context. For this reason, the balance sheet reduction figures prominently in the C-context.

14.2.2 Inconsistency on the first level

It should be recalled that an inconsistency can occur at two levels. The first level concerns the question whether the Commission has consistently assessed whether the relevant characteristics are present in the case at hand. The second level concerns the way how the relevant characteristics are elaborated in the decisions.

The analysis of the decisional practice has revealed several inconsistencies on the first level. Indeed, there are several relevant characteristics that are not taken into account in every case. One would expect the relevant characteristics to be present in every case, or one would expect a justification (or at least an explanation) why a relevant characteristic is not present in the case at hand. This can be illustrated by the relevant characteristic that was discussed in section 11.2: the fact that the senior management of the beneficiary bank has been replaced. Since the replacement of the senior management can be considered as the norm[1], one would expect that every decision mentions whether the senior management has been replaced: the Commission either welcomes the replacement of the bank's senior management or it explains why such a replacement would not be appropriate in the case at hand. In other words: one would expect the Commission to mention the relevant characteristic in the decision. As explained in section 11.2, there are 23 decisions (of in total 90 cases) that indicate whether the senior management has been replaced, so there are 67 decisions that do not mention this relevant characteristic. In my opinion, this omission to mention whether the senior management has been replaced, amounts to an inconsistency.

Two compensatory measures are worth mentioning: i) the divestment aimed at creating a new competitor, and ii) the price leadership ban. These two compensatory measures were required by the Commission in the early bank State aid cases. However, as explained in chapter 13, these two compensatory measures do not appear in later bank State aid cases. Does this constitute a hange of approach? This could have been better explained or clarified by the Commission.

14.2.3 Inconsistency on the second level

One of the aims of the analysis of the decisional practice was to find out in how many cases a relevant characteristic is taken into account. In some instances, counting the number of cases (in which a relevant characteristic is taken into account) is less valuable. It should be recalled that there can be an inconsistency at two levels. Accordingly, even if a certain relevant characteristic is taken into account in every bank State aid case, there can still be an inconsistency on a deeper level. This is the case when the 'characteristics' of the relevant characteristic are not consistently taken into account – in the terminology of this PhD-study: when the relevant characteristic is not *elaborated in a consistent*

1. That the replacement of the senior management can be considered as the norm is confirmed by point 37 of the 2013 Banking Communication.

manner.[2] For some relevant characteristics, the emphasis is therefore on the question how a certain relevant characteristic is elaborated rather than on the question in how many cases it was taken into account.

To give an example: the fact that the beneficiary bank is subject to an acquisition ban is a relevant characteristic.[3] The acquisition ban has several modalities, such as the duration of the ban, its scope and its exceptions. Until the adoption of the 2013 Banking Communication, the modalities of the acquisition ban differed among the cases. Nevertheless, in every case that was characterised by an acquisition ban, the Commission welcomed the fact that there was an acquisition ban, even though the scope of the acquisition ban and the exemptions to the acquisition ban were different.

In my view, the principle of equal treatment does not require that all the modalities of the acquisition ban should be the same in each case. However, it does require that the Commission should take into account the relevant differences between the cases. Thus, if cases differ on the modalities, then one would expect that these differences are taken into account by the Commission. In particular, one would expect some kind of justification or explanation why the scope of the acquisition ban is different or why some exemptions are not included. Such explanation is not given by the Commission in its decisional practice. Most decisions only mention that the Commission welcomes the acquisition ban, without taking into account the different modalities of the acquisition ban. This amounts to an inconsistency. It should, however, be recalled that this inconsistency was put to an end by the adoption of the 2013 Banking Communication. Indeed, this Communication provides for an acquisition ban with uniform modalities.

Although the inconsistency with respect to the acquisition ban was put to an end, it is illustrative of the finding that the Commission did not always draw conclusions from differences in modalities.

14.3 Implications

The previous section summarised the key findings of this PhD-study. What conclusions can be drawn from these findings? And what are their implications for the Commission, Member States and banks?

2. In section 6.7.3, I explained that the term "characteristics of the relevant characteristic" might be confusing, For that reason, I used the term "the elaboration of the relevant characteristic".
3. This relevant characteristic was discussed in section 13.9.

14.3.1 Interpreting the findings: has the Commission favoured certain banks?

This PhD-study found several inconsistencies in the decisional practice of the Commission. It is worthwhile to find out if these findings can provide an answer to the question whether the Commission has favoured certain banks. Although this is not the research question of this PhD-study, it nonetheless is an intriguing one.

Chapter 6 already touched upon this question. As set out in that chapter, a bank is treated favourably when the restructuring plan is less far-reaching than it should be (on the basis of the distortive effects of the State aid). In popular terms: a bank is treated favourably when it is 'punished' less than it deserves. In that regard, it should be recalled that it is not possible to determine how severe a bank is 'punished' by the Commission. In addition, it is not possible to determine how damaging the State aid is. There is thus no easy way of finding out if the Commission has favoured certain banks. For that reason, it is valuable to see if this question can be answered by interpreting the inconsistencies in the Commission decisions found by this PhD-study.

As shown in this PhD-study, there are several decisions in which the Commission did not mention whether the case was characterised by the relevant characteristic. For instance, there are many decisions in which the Commission did not mention whether the senior management of the bank was replaced. This could mean that the relevant characteristic is not present in these cases; in other words: that the senior management was not replaced. The failure to take this into account is favourable to the bank in question. Indeed, as discussed in section 3.5.2, the 'typical' outcome of the compatibility-assessment is that the State aid – in light of the restructuring plan – is compatible and thus approved by the Commission. If this outcome is reached *irrespective of the restructuring measures*, then this is unfavourable to the banks that are confronted with far-reaching restructuring measures.

The next step would be to find out if a certain pattern can be discerned. In other words: are there banks in respect to which the Commission consistently failed to assess whether the case was characterised by certain relevant characteristics? If this would be the case, then these banks would have been treated favourably by the Commission.

However, this approach cannot provide a clear answer to the question whether the Commission has favoured certain banks. In the first place, the analysis of the bank State aid decisions did not reveal a pattern of cases in which the Commission omitted to mention the relevant characteristic.

In the second place, the omission to mention the relevant characteristic does not necessarily mean that the relevant characteristic is not present in the case at hand. Indeed, as explained in section 11.2, the omission to mention the relevant characteristic – such as the replacement of the bank's senior management – could mean two things: i) the senior management was not replaced; ii) the senior management was replaced, but the Commission failed to take this into account. In situation (i), the Commission favoured the bank, since it did not draw any conclusions from the fact that the senior management of the bank was not replaced. By contrast, in situation (ii), the Commission did not take into account the replacement of the senior management, whilst it normally welcomes such a replacement.

Thus, it cannot be established whether the omission to mention the relevant characteristic was favourable to the bank in question or not. Consequently, even if there were a pattern of cases in which the Commission failed to mention the relevant characteristic, this does not have to mean that these banks were favoured by the Commission.

In the third place, even if the inconsistencies would turn out to be favourable to certain banks, then this does not have to mean that the Commission had the intention to favour these banks. Indeed, the inconsistencies found in this PhD-study can be explained in two ways: either the Commission has been somewhat *negligent*, or the Commission has *deliberately* not taken into account the relevant characteristics in certain cases. Deliberately not taking into account relevant characteristics would suggest that the Commission has intentionally favoured certain banks. This implies that there are other factors at play. However, as set out in section 6.7, this PhD-study focusses on the characteristics *that are mentioned in the decisions*. Relevant characteristics that are not mentioned in the decisions, fall outside the scope of the analysis performed in this PhD-study. This PhD-study does thus not provide an answer to the question whether the inconsistencies are due to negligence or to intention.

For these three reasons, it cannot be ascertained – on the basis of the analysis conducted in this PhD-study – whether the Commission has favoured certain banks. However, *it cannot be excluded* either. Indeed, as long as there are inconsistencies in the decisional practice, it cannot be excluded that the Commission has favoured certain banks. This finding should have implications for the Commission, as will be discussed below.

14.3.2 Implications for the Commission

In my opinion, the fact that it cannot be excluded that the Commission has favoured certain banks, is problematic for the Commission. Indeed, the mere impression that the Commission has treated some banks unfairly could be detrimental to the public support for the Commission's State aid control. For that reason, the Commission should be concerned with avoiding the impression that it has treated banks unfairly. The best way to avoid creating such an impression is by treating State aid cases consistently.

In that regard, it should be recalled that the Commission has shown that it is concerned with treating cases consistently. As discussed in section 6.7.3, the Commission explicitly refers to other cases in order to demonstrate that the decision is in line with its previous decisional practice. This illustrates that the Commission is concerned with treating cases consistently.

As submitted in this PhD-study, the only way in which bank State aid cases can be treated consistently, is by using the 'relevant-characteristics approach'. In the first place, the Commission should asses in every bank State aid case whether the relevant characteristics are present in that case. In other words: the relevant characteristics should be consistently used as assessment criteria. In the second place, the relevant characteristics should be elaborated in a consistent manner.

14.3.3 Implications for the Member States and beneficiary banks

How are the key findings of this PhD-study relevant to the Member States and beneficiary banks? Can they use the findings to challenge the decisions? As touched upon in chapter 5, an action for annulment can only be brought within a strict time-limit. So this PhD-study has no implications for previous bank State aid cases. However, it is relevant for future cases: the list of relevant characteristics can be used in future cases to assess if the decision complies with the principle of equal treatment.

In that regard, it should be recalled that this PhD-study distinguished between three stages: anticipating the "treatment", negotiating the "treatment" and challenging the "treatment". Chapter 5 made some important observations on the third stage. Chapter 5 showed that there are relatively few Member States and banks who challenge the Commission decision before the Court by bringing an action for annulment. Another finding is that only a fraction of these actions for annulment was successful. I would therefore recommend that Member States and beneficiary banks focus their attention and efforts on the first and second stage. In other words: they should bear in mind the relevant characteristics when drafting the restructuring plan ('anticipating the treatment'). In the second stage, during the negotiations with the Commission, they could stress the presence of certain relevant characteristics in the case at hand.

Final remarks

This PhD-study began with the observation that there is a lack of clarity as to whether bank State aid decisions comply with the principle of equal treatment. As set out in chapter 1, this lack of clarity is due to the fact that it cannot easily be established whether a decision complies with the principle of equal treatment. With this PhD-study – which provides a framework that can be used to assess whether a decision is in line with the principle of equal treatment – I hope to have contributed to providing some clarity.

Summary

This PhD-study examined the decisional practice of the Commission on State aid to banks.

Chapter 1 introduced the main research question and the aim of this PhD-study. There is some doubt whether the principle of equal treatment is respected by the Commission in its bank State aid decisions. This doubt is caused by a *lack of clarity*. The aim of this PhD-study is to tackle this problem by providing some clarity. In other words: the aim of this PhD-study is to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment.

Chapter 2 provided a basic background of the concepts 'State aid' and 'State aid control'. There may be valid reasons to grant State aid, but State aid can also be harmful. In principle, State aid is prohibited, but it can – in certain instances – be authorised ("declared compatible") by the Commission.

Chapter 3 focussed on State aid *to banks*. During the financial crisis, granting State aid to banks was necessary; not just to rescue one bank, but to rescue the entire financial system. This follows from the fact that bank failure is contagious. In addition, banks are essential to the economy. For these two reasons, granting State aid to banks may be justified. This was recognised by the Commission, which adopted the so-called Crisis Framework (consisting of the Crisis Communications). In the Crisis Communications, the Commission gave guidance.

Chapter 4 discussed the bank resolution framework, consisting of the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism (SRM)-Regulation. The main message of Chapter 4 is that – notwithstanding the introduction of the BRRD, SRM and DRI – State aid to banks remains relevant, the State aid control framework remains relevant and this PhD-study remains relevant.

Chapter 5 provided an overview of the case-law on bank State aid. In addition, this chapter discussed how the Court of Justice EU ("CJEU") has interpreted the principle of equal treatment. The main findings of this chapter can be summarised as follows. In the first place, most bank State aid decisions are not challenged before the CJEU. In the second place, the principle of equal treatment is interpreted very narrowly by the CJEU.

Chapter 6 delved into the question how the principle of equal treatment can be applied to bank State aid cases. In that regard, the CJEU-definition and the Aristotelian formula were discussed. However, I am of the opinion that the CJEU-definition is unsatisfactory and that the Aristotelian formula is unfeasible. I therefore propose a different approach towards the principle of equal treatment: the 'relevant-characteristics approach'. In each bank State aid case, the Commission should take into account these relevant characteristics. Indeed, when these relevant characteristics are consistently taken into account by the Commission, then the decisional practice of the Commission complies with the principle of equal treatment.

Chapter 7 discussed the preliminary steps in the Commission's assessment. The first preliminary step is the question whether the aid measures constitute State aid within the meaning of Article 107(1) TFEU. The second preliminary step is to establish whether the compatibility of the aid measure has to be assessed on the basis of Article 107(3)(b) TFEU. The essential criterion in that respect is the systemic importance of the bank. However, since the Commission takes the view that in the situation of a financial crisis, every bank that collapses can create a serious disturbance, every bank is considered to have systemic importance. Consequently, the (implicit) assessment criterion 'systemic importance' is always met.

Chapter 8 discussed characteristics that are relevant to the assessment of whether the State aid is "appropriate", "necessary" and "proportionate". This concerns the first stage of the compatibility-assessment: State aid can only be declared compatible when it is "appropriate", "necessary" and "proportionate". In this stage of the compatibility-assessment, the Commission was quite lenient: in none of the cases, the Commission concluded that the State aid was not appropriate, necessary or proportionate.

Chapter 9 discussed characteristics that are relevant to the assessment of the compatibility of impaired assets measures. These measures have to be compatible with the principles of the Impaired Assets Communication (IAC). In that regard, the IAC sets out the following criteria for the compatibility of asset relief measures: i) eligibility of assets, ii) transparency and disclosure, iii) management of assets, iv) valuation, and v) burden-sharing and remuneration. In every case that involved asset relief measures, the Commission applied the five IAC-criteria. Interestingly, there were several asset relief measures that did not meet the IAC-criteria. However, these asset relief measures were still approved by the Commission, because the non-compliance with the IAC-criteria was compensated for by far-reaching restructuring.

Chapter 10 discussed characteristics that are relevant to the assessment of whether far-reaching restructuring is required. The degree of restructuring depends primarily on i) the aid amount, and ii) the question whether the bank's difficulties were caused by endogenous problems or by external factors. The fact that the aid amount is high (or the opposite: that it is low) and the fact that the bank's difficulties were caused by endogenous problems (or the opposite: caused by external factors) are thus relevant characteristics.

Chapter 11 discussed characteristics that are relevant to the assessment of the first restructuring objective: long-term viability. In every Restructuring Decision, the Commission assesses whether the restructuring plan ensures that the beneficiary bank will return to long-term viability. In that regard, the Commission notes positively the fact that the corporate governance framework, risk management, remuneration policy, funding and operational efficiency of the bank will be improved.

Chapter 12 discussed characteristics that are relevant to the assessment of the second restructuring objective: burden-sharing. Burden-sharing means that the bank and its capital holders should contribute to the restructuring as much as possible with their own resources. Burden-sharing by shareholders can be achieved in various ways: for instance by diluting the shareholders in the context of a recapitalisation, or by expropriating the shareholders in the context of a nationalisation of the bank. Also burden-sharing by subordinated debt holders can be achieved in various ways. Not all bank State aid cases are characterised by the same type of burden-sharing, nor are they characterised by the same level of burden-sharing. However, the 2013 Banking Communication raised the minimum requirements for burden-sharing. By doing so, it contributed greatly to a consistent application of the burden-sharing principle.

Chapter 13 discussed characteristics that are relevant to the assessment of the third restructuring objective: minimising competition distortions. The problematic aspect of State aid is that it may create distortions of competition. For this reason, the restructuring plan should contain compensatory measures (i.e. measures to compensate for the distortions of competition). The Commission assesses whether the compensatory measures are sufficient to mitigate the competition distortions stemming from the State aid. This depends essentially on two aspects: i) the competitive impact of the State aid; and ii) the type and nature of the compensatory measures.

Chapter 14 presented the conclusions of my research. The aim of this PhD-study is to provide a framework which can be used to establish whether a bank State aid decision complies with the principle of equal treatment. This framework effectively consists of a list of relevant characteristics. As submitted in this PhD-study, the only way in which bank State aid cases can be treated consistently, is by using the 'relevant-characteristics approach'. In the first place, the Commission should asses in every bank State aid case whether the relevant characteristics are present in that case. In other words: the relevant characteristics should be consistently used as assessment criteria. In the second place, the relevant characteristics should be elaborated in a consistent manner.

Samenvatting

In dit proefschrift is de beschikkingspraktijk van de Commissie op het gebied van staatssteun aan banken onderzocht.

In **Hoofdstuk 1** werd de aanleiding voor dit onderzoek uiteengezet. Er is enige onduidelijkheid of het gelijkheidsbeginsel wel door de Commissie in acht is genomen in diens staatssteunbeschikkingen. Het doel van mijn onderzoek is om deze onduidelijkheid weg te nemen. Met andere woorden: het doel van mijn onderzoek is om tot een analysekader te komen op basis waarvan kan worden vastgesteld of een staatssteunbeschikking in lijn is met het gelijkheidsbeginsel.

In **Hoofdstuk 2** werd de achtergrond van het concept 'staatssteun' belicht. Aan de ene kant verstoort staatssteun de concurrentieverhoudingen op de markt en daarmee het 'gelijke speelveld'. Aan de andere kant kunnen er gegronde redenen zijn om staatssteun te verlenen. In beginsel is staatssteun verboden. De Commissie kan de staatssteun evenwel "verenigbaar verklaren met de interne markt", oftewel goedkeuren.

Hoofdstuk 3 richtte zich op staatssteun aan banken. Tijdens de financiële crisis was staatssteun aan banken noodzakelijk – niet alleen om afzonderlijke banken te redden, maar om de gehele bankensector overeind te houden. Banken zijn namelijk zodanig met elkaar verweven dat de val van een bank als een dominosteen kan werken. De financiële stabiliteit vormt een rechtvaardiging om staatssteun te verlenen aan banken. De Commissie erkende dat staatssteun aan banken noodzakelijk en heeft daarom de zogenoemde 'crisismededelingen' vastgesteld. In deze mededelingen heeft de Commissie aangegeven hoe zij de staatssteun aan banken zou gaan beoordelen.

In **Hoofdstuk 4** werd een beschrijving gegeven van de nieuwe regelgeving die voorziet in de afwikkeling ("resolutie") van banken. Ondanks deze nieuwe regelgeving blijft staatssteun aan banken relevant.

In **Hoofdstuk 5** werd een overzicht gegeven van de jurisprudentie van het Hof van Justitie EU op het gebied van staatssteun aan banken. Tevens werd uiteengezet hoe het Hof van Justitie het gelijkheidsbeginsel invult. In dit hoofdstuk kwam ik tot twee belangrijke conclusies. Ten eerste zijn er maar weinig staatssteunzaken aan het Hof van Justitie voorgelegd. En ten tweede heeft het Hof van Justitie het gelijkheidsbeginsel op een – mijns inziens – zeer beperkte wijze ingevuld.

Hoofdstuk 6 richtte zich op de vraag hoe het gelijkheidsbeginsel kan worden toegepast in staatssteunzaken. In dat kader werden de Aristotelische gelijkheidsformule en de invulling die het Hof van Justitie geeft aan het gelijkheidsbeginsel besproken. Aan beide benaderingen kleven naar mijn mening haken en ogen: de invulling van het Hof van Justitie vind ik te beperkt en de Aristotelische gelijkheidsformule acht ik praktisch niet toepasbaar in staatssteunzaken. Daarom kom ik met een eigen benadering: de 'relevante karakteristieken benadering'. Naar mijn mening vereist het gelijkheidsbeginsel dat de Commissie in elke staatssteunzaak de relevante karakteristieken in aanmerking neemt.

Hoofdstuk 7 zag op de voorfase in de beoordeling van staatssteunmaatregelen door de Commissie. In deze voorfase staan twee vragen centraal. Is er sprake van staatssteun in de zin van artikel 107, lid 1, VWEU? En – indien er sprake is van staatssteun – dient de verenigbaarheid van de staatssteun beoordeeld te worden op basis van artikel 107, lid 3, sub b, VWEU? Van groot belang bij die laatste vraag is de systeemrelevantie van de bank. Er dient echter geconstateerd te worden dat de Commissie van oordeel is dat in een crisissituatie zowat elke bank systeemrelevant is. De systeemrelevantie is derhalve geen onderscheidend criterium.

In **Hoofdstuk 8** werden de omstandigheden ("relevante karakteristieken") besproken die relevant zijn voor de beoordeling van de vraag of de staatssteun "geschikt, noodzakelijk en evenredig" is. Waar de Commissie bij de beoordeling van het herstructureringsplan tamelijk streng is, is de Commissie bij de beoordeling van de geschiktheid, noodzakelijkheid en evenredigheid van de steun zeer soepel: in geen van de staatssteunzaken was de Commissie van oordeel dat de steun niet geschikt, noodzakelijk en evenredig was.

In **Hoofdstuk 9** werden de omstandigheden ("relevante karakteristieken") besproken die relevant zijn voor de beoordeling van maatregelen inzake activaondersteuning. Deze maatregelen dienen te voldoen aan de criteria van *Mededeling van de Commissie betreffende de behandeling van aan een bijzondere waardevermindering onderhevige activa in de communautaire banksector* – beter bekend als de Impaired Assets Communication (IAC). In een paar zaken was niet aan deze criteria voldaan. Dit werd echter gecompenseerd door het feit dat er sprake was van een vergaande herstructurering.

In **Hoofdstuk 10** werden de omstandigheden ("relevante karakteristieken") besproken die relevant zijn voor de beoordeling van de vraag of vergaande herstructurering noodzakelijk is. Het steunbedrag is daarbij een bepalende factor, evenals de vraag of de problemen van de bank te wijten zijn aan interne of externe factoren.

In **Hoofdstuk 11** werden de omstandigheden ("relevante karakteristieken") besproken die relevant zijn voor de beoordeling van de eerste pijler van het herstructureringsplan: het herstel van de levensvatbaarheid van de bank. Het bedrijfsmodel, de organisatiestructuur, de corporate governance, het risicobeheer, het beloningsbeleid en de financieringsstructuur zijn daarbij bepalende factoren.

In **Hoofdstuk 12** werden de omstandigheden ("relevante karakteristieken") besproken die relevant zijn voor de beoordeling van de tweede pijler van het herstructureringsplan: eigen bijdrage van de begunstigde onderneming (lastendeling). Dit houdt in dat de bank en haar aandeelhouders zo veel mogelijk uit eigen middelen aan de herstructurering dienen bij te dragen. De mate van lastendeling is niet in elke zaak gelijk. De Bankenmededeling van 2013 verscherpt de minimumeisen inzake lastendeling en leidt daardoor tot een consistente benadering van lastendeling.

In **Hoofdstuk 13** werden de omstandigheden ("relevante karakteristieken") besproken die relevant zijn voor de beoordeling van de derde pijler van het herstructureringsplan: het beperken van de mededingingsvervalsing. Staatssteun kan op verschillende wijzen de mededinging vervalsen. Staatssteun kan daarom alleen worden goedgekeurd indien er maatregelen worden genomen om de mededingvervalsing te beperken, zoals een overnameverbod, een prijsleiderschapsverbod en een balansreductie. In elke staatssteunzaak beoordeelt de Commissie of deze maatregelen afdoende zijn.

In **Hoofdstuk 14** werden de conclusies van mijn onderzoek uiteengezet. Het doel van mijn onderzoek is om tot een analysekader te komen op basis waarvan kan worden vastgesteld of een staatssteunbeschikking in lijn is met het gelijkheidsbeginsel. Dit analysekader bestaat in feite uit de relevante karakteristieken. Naar mijn mening vereist het gelijkheidsbeginsel dat de Commissie in elke staatssteunzaak deze relevante karakteristieken in aanmerking neemt. Met andere woorden: de Commissie dient in elke zaak te onderzoeken of de relevante karakteristieken aanwezig zijn.

Annexes

Annex I
Overview of the relevant characteristics

Annex II
Number of bank State aid decisions

Annex III
List of decisions on individual bank State aid cases

Annex IV
Overview of the compatibility-assessment

Annex V
Behavioural commitments under bank support schemes

Annex VI
List of banks benefiting from asset relief measures

Annex VII
Viability-measures

Annex VIII
Burden-sharing by shareholders

Annex IX
Burden-sharing by hybrid and subordinated debt holders

Annex X
Acquisition ban

Annex XI
Price leadership ban and other pricing restrictions

Annex XII
Divestments

Annex I: Overview of the relevant characteristics

The following table provides an overview of the characteristics that are relevant to the Commission's assessment of bank State aid measures. This assessment comprises various steps and the relevant characteristics are categorised accordingly (see section 6.9.1). Chapters 8 to 13 of this PhD-study each focussed on a specific step of the Commission's assessment. In these chapters, the relevant characteristics were identified and some inconsistencies were detected. The findings are summarised in the following table.

<table>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">Chapter 8: Appropriate, necessary and proportionate</td></tr>
<tr><td colspan="3"><u>First stage of the compatibility-assessment</u>
- when the measure constitutes State aid,
- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,
- in case of a guarantee or recapitalisation:
Assessment of whether the State aid measure meets the (cumulative) criteria of appropriateness, necessity and proportionality.</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td rowspan="2">Characteristics relevant to that assessment:</td><td>Consistency (I)</td><td>Consistency (II)</td></tr>
<tr><td>Has the Commission consistently taken into account this relevant characteristic?</td><td>Is the relevant characteristic elaborated in a consistent manner?</td></tr>
<tr><td>* The fact that the beneficiary bank has systemic importance.</td><td>In every decision, the Commission assessed whether the bank had systemic relevance. Thus, in that regard, there is no inconsistency (see sections 7.6 and 8.2)</td><td>If one takes the view that all banks have systemic relevance, then the observation that the Commission has consistently held that the beneficiary bank has systemic relevance, means that there is no inconsistency. By contrast, if one takes the view that some banks are systemically important while others are not, then the approach of the Commission amounts to an inconsistency (see sections 7.6 and 8.2).</td></tr>
<tr><td>* The fact that the aid measure strengthens the bank and restores market confidence.</td><td>The Commission easily arrived at the conclusion that the aid is appropriate (see section 8.3).</td><td>This relevant characteristic is to a very large extent self-explanatory. It would have been very hard for the Commission to be inconsistent (see section 8.3).</td></tr>
</table>

* The fact that the guarantee is **limited in time and scope**.	The Commission **consistently** assessed whether the guarantee was limited in time and scope (see section 8.4).	There were some exceptions (for instance, when the guarantee scheme included subordinated debt). However, these exceptions were justified. There are therefore **no indications of an inconsistency** (see section 8.4).
* The fact that beneficiary bank has to pay an **adequate remuneration** to the State.	The Commission **consistently** assessed whether the remuneration was adequate (see section 8.6).	There are **no indications of an inconsistency** (see section 8.6).
* The fact that there are **exit** incentives.	The Commission **consistently** assessed whether there were exit incentives.	In essence, all behavioural constraints are to some extent 'painful' and make it unattractive for a bank to be dependent on State aid over a long period.
* The fact that there are **behavioural restrictions** (in the rescue phase).	The Commission **consistently** assessed whether there were behavioural restrictions.	There are no indications of an inconsistency.
Additional relevant characteristics in the context of a bank support scheme:		
* The fact that the scheme is targeted at **solvent/ fundamentally sound** banks.	It is **not applied consistently**: while the Commission notes positively the fact that the scheme is aimed at fundamentally sound banks, it does not note negatively the fact that the scheme is open to all banks.	A consistent application would require a uniform definition of 'solvent'. However, the decisions do not apply a uniform definition of 'solvent'.
* The fact that subsidiaries of foreign banks are **eligible** for the scheme.	That the scheme should be open for subsidiaries of foreign banks, is a clear requirement to which Member States have to comply.	There are no indications of an inconsistency.
* The fact that the bank support scheme has a **maximum budget**.	The Commission usually notes that the scheme has a maximum budget. There are no indications of an inconsistency.	There are no indications of an inconsistency.

Chapter 9: IAC		
First stage of the compatibility-assessment *- when the measure constitutes State aid,* *- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,* *- in case of an asset relief measure:* Assessment of whether the asset relief measure complies with the criteria of the **Impaired Assets Communication**.		
Characteristics relevant to that assessment:	*Consistency (I)*	*Consistency (II)*
	Has the Commission consistently taken into account this relevant characteristic?	*Is the relevant characteristic elaborated in a consistent manner?*
* The fact that the measure has **the effect** of relieving the bank from its impaired assets.	In every case, the Commission should assess whether the IAC is applicable.	
* The fact that the '**eligibility**-criterion' of the IAC has been met. * The fact that the '**transparency and disclosure**-criterion' of the IAC has been met. * The fact that the '**management**-criterion' of the IAC has been met. * The fact that the '**valuation**-criterion' of the IAC has been met. * The fact the '**burden-sharing and remuneration** criterion' of the IAC has been met.	In all cases involving impaired asset measures, the Commission assessed whether the IAC-criteria had been met. In that regard, there is **no inconsistency**.	There are no indications of an inconsistency.

Chapter 10: Need for in-depth restructuring

Intermediate step

- when the measure constitutes State aid,

- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,

- when the State aid is appropriate, necessary and proportionate/complies with the IAC-criteria:

Assessment of whether a **restructuring plan** is required for the beneficiary bank/assessment whether **far-reaching restructuring** is needed.

Characteristics relevant to that assessment:	*Consistency (I)*	*Consistency (II)*
	Has the Commission consistently taken into account this relevant characteristic?	*Is the relevant characteristic elaborated in a consistent manner?*
* The fact that the beneficiary bank is **fundamentally sound**./ The fact that the beneficiary bank is distressed.	The First Prolongation Communication removed the distinction between fundamentally sound banks and distressed banks. Until the entry into force of this Communication, the Commission **consistently assessed** whether the beneficiary bank was fundamentally sound (see section 10.2.1).	There are no indications of an inconsistency.
(*) The fact that the remuneration is inadequate. /The fact that the **own contribution is inadequate**.	The assessment whether the remuneration is adequate includes the assessment whether an inadequate remuneration should be compensated for by far-reaching restructuring. Indeed, in every case, the Commission either concluded that the remuneration was adequate or concluded that the low level of remuneration must be compensated for by far-reaching restructuring.	There are no indications of an inconsistency.
(*) The fact that the bank's difficulties are **caused by external factors**./The fact that the bank's difficulties are **caused by internal factors**.	This relevant characteristic does not necessarily have to be mentioned in every decision, since it is – in any event – taken into account by the Commission when it assesses whether the restructuring plan meets the three restructuring objectives.	There are no indications of an inconsistency.

<table>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">Chapter 11: Viability</td></tr>
<tr><td colspan="3"><u>Second stage of the compatibility-assessment</u>
- when the measure constitutes State aid,
- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,
- when the State aid is appropriate, necessary and proportionate / complies with the IAC-criteria,
- when a restructuring plan is required:
Assessment of whether the restructuring plan meets the restructuring objective of restoring long-term viability.</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td>Characteristics relevant to that assessment:</td><td>Consistency (I)

Has the Commission consistently taken into account this relevant characteristic?</td><td>Consistency (II)

Is the relevant characteristic elaborated in a consistent manner?</td></tr>
<tr><td>* The fact that the senior management of the beneficiary bank has been replaced.</td><td>This relevant characteristic is not mentioned in every decision. There is no plausible explanation for this omission to mention this relevant characteristic. This would indicate an inconsistency (see section 11.2.2).</td><td>The decisional practice gives a very varied picture of ‘senior management’. Thus, the elaboration of this relevant characteristic could have been more consistent (see section 11.2.3).</td></tr>
<tr><td>* The fact that the restructuring plan provides for an improvement of the bank’s corporate governance framework.</td><td>This relevant characteristic is not mentioned in every decision. This can be explained by the fact that this relevant characteristic does not have to be present in every case. In that regard, there is no inconsistency (see section 11.3.2).</td><td>The way in which this relevant characteristic is elaborated in the decisions depends on the nature of the corporate governance problems. This is not necessarily inconsistent (see section 11.3.3).</td></tr>
<tr><td>* The fact that the restructuring plan provides for an improvement the bank’s risk management.</td><td>This relevant characteristic is not mentioned in every decision. This can be explained by the fact that this relevant characteristic does not have to be present in every case. In that regard, there is no inconsistency (see section 11.4.2).</td><td>The way how risk management is mentioned in the decisions depends on the nature of the risk management problems. This is not necessarily inconsistent (see section 11.4.3).</td></tr>
<tr><td>* The fact that the restructuring plan contains restrictions of the remuneration of the beneficiary bank’s employees and managers.</td><td>This relevant characteristic is not mentioned in every decision. However, prior to the 2013 Banking Communication, this relevant characteristic did not have to be present in every case. In that regard, there is no inconsistency (see section 11.5.2).</td><td>The modalities of the remuneration restrictions were often different per bank. The 2013 Banking Communication put an end to this inconsistency (see section 11.5.3).</td></tr>
</table>

* The fact that the restructuring plan provides for a reduction of the bank's reliance on wholesale **funding**.	This relevant characteristic is not mentioned in every decision. There is no plausible explanation for the omission to mention this relevant characteristic. This would indicate an **inconsistency** (see section 11.6.2).	There are no indications of an inconsistency (see section 11.6.3).
* The fact that the beneficiary bank will focus on its core activities (and thus **divest its non-core activities**).	The relevant characteristic is not mentioned in every decision. This can be explained by the relevant context. In that regard, there is **no inconsistency** (see section 11.7.2).	There is no uniform definition of 'non-core activities'. This is **not necessarily inconsistent** (see section 11.7.3).
* The fact that the beneficiary bank has implemented **cost-cutting measures**.	Cost-cutting measures are not mentioned in every decision, but this can be explained by the relevant context. In that regard, there is **no inconsistency** (see section 11.8.2).	Although the extent of cost-cutting is mentioned in the decision, it is not explicitly taken into account in the assessment of the viability and burden-sharing (see section 11.8.3).
* The fact that the bank participates in an Asset Protection Scheme or has transferred **impaired assets** to an Asset Management Company.	The relevant characteristic is not mentioned in every decision. This can be explained by the fact that this relevant characteristic does not have to be present in every case. In that regard, there is **no inconsistency** (see section 11.9.2).	There are no indications of an inconsistency (see section 11.9.3).
* The fact that the acquiring bank has a **strong financial position**. * The fact that the acquiring bank is much **larger** than the ailing bank. * The fact that the acquiring bank has a **good track record in extracting synergies**. * The fact that **only the good parts of the ailing bank are transferred** to the acquiring bank.	These relevant characteristics are only applicable in the T-context and S/T/W-context. In that regard, there is **no inconsistency** (see section 11.10.2).	There are no indications of an inconsistency (see section 11.10.3).
* The fact that the **assumptions** (on which the financial projections are based) are reasonable.	The Commission has **consistently** checked whether the assumptions were reasonable (see section 11.12.2).	There are no indications of an inconsistency (see section 11.12.3).

<table>
<tr><td colspan="3"></td></tr>
<tr><td colspan="3">Chapter 12: Burden-sharing</td></tr>
<tr><td colspan="3"><u>Second stage of the compatibility-assessment</u>
- when the measure constitutes State aid,
- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,
- when the State aid is appropriate, necessary and proportionate/complies with the IAC-criteria,
- when a restructuring plan is required:
Assessment of whether the restructuring plan meets the restructuring objective of burden-sharing.</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td rowspan="2">Characteristics relevant to that assessment:</td><td>Consistency (I)</td><td>Consistency (II)</td></tr>
<tr><td>Has the Commission consistently taken into account this relevant characteristic?</td><td>Is the relevant characteristic elaborated in a consistent manner?</td></tr>
<tr><td>* The fact that the chosen rescue/restructuring is the least costly alternative.</td><td>There are only a few decisions that explicitly mention that the chosen scenario is the least costly one (see section 12.2.2). This is inconsistent, but not problematic (see section 12.2.4).</td><td>Although elaborated in various manners, there are no indications of an inconsistency (see section 12.2.3).</td></tr>
<tr><td>* The fact that the beneficiary bank is divesting (profitable non-core) subsidiaries.</td><td>The more general observation that the bank is using own resources to finance the restructuring can be found in almost any decision. In that regard, there is no inconsistency (see section 12.3.2).</td><td>In most decisions, the fact that the bank has made divestments is not very elaborated (see section 12.3.3).</td></tr>
<tr><td>* The fact that the beneficiary bank is nationalised.
* The fact that the bank's shareholders are diluted.
* The fact that the bank's shareholders participate in a capital raising exercise.
* The fact that the bank's shareholders remain at the bad bank or the bank in liquidation.
* The fact that the bank's equity is completely written-down.
* The fact that the beneficiary bank is subject to a dividend ban.</td><td>In principle, burden-sharing is required in every bank State aid case. Accordingly, in every case, the Commission has assessed whether there was burden-sharing. In that regard, there is no inconsistency (see section 12.5.2).</td><td>Whether the different types of burden-sharing are equivalent to each other (in terms of how burdensome they are) depends on the exact modalities of the burden-sharing measures (see section 12.5.3.6).</td></tr>
</table>

* The fact that the beneficiary bank conducted a **liability management exercise** (LME). * The fact that the subordinated debt is completely **written-down**. * The fact that subordinated debt holders are **not transferred** to the acquiring bank, but remain in the bad bank or the entity in liquidation. * The fact that the beneficiary bank is subject to a **coupon ban**.	In principle, burden-sharing is required in every bank State aid case. Accordingly, in every case, the Commission has assessed whether there was burden-sharing. In that regard, there is **no inconsistency** (see section 12.6.2).	Whether the different types of burden-sharing are equivalent to each other (in terms of how burdensome they are) depends on the exact modalities of the burden-sharing measures (see section 12.6.3.4).
Chapter 13: Competition distortions Second stage of the compatibility-assessment *- when the measure constitutes State aid,* *- when Article 107(3)(b) TFEU forms the basis of the compatibility-assessment,* *- when the State aid is appropriate, necessary and proportionate/complies with the IAC-criteria,* *- when a restructuring plan is required:* Assessment of whether the restructuring plan meets the restructuring objective of **minimising competition distortions**.		
Characteristics relevant to that assessment:	*Consistency (I)*	*Consistency (II)*
	Has the Commission consistently taken into account this relevant characteristic?	*Is the relevant characteristic elaborated in a consistent manner?*
* The fact that the **aid amount** is very large./The fact that the aid amount is relatively low.	In its decisional practice, the Commission has **consistently** taken into account the amount of State aid (see section 13.2.2).	There are **no indications of an inconsistency** (see section 13.2.3).
* The fact that the beneficiary bank has a limited **market presence**. * The fact that the bank is one of the **market leaders**. * The fact that the market is **concentrated**.	In several decisions, the market position of the bank is not mentioned as an indication of the competitive impact. The finding that the market position is not always used as an assessment criterion points at an **inconsistency** (see section 13.3.2).	The market characteristics are not always elaborated to the same extent. Some decisions contain more detailed information than other decisions. This would indicate an **inconsistency** (see section 13.3.3).

* The fact that the beneficiary bank will implement **market-opening measures**.	Market-opening measures only appear in a few cases and are thus not a very common compensatory measure (see section 13.4.2).	There are **no indications of an inconsistency** (see section 13.4.3).
(*) The fact that the **divestment is aimed at creating a new competitor**.	Only in a few cases, the divestment was specifically aimed at creating a new competitor. Remarkably, the Commission did not clarify why this type of divestment was not needed in all cases. While there may be valid reasons to change the approach towards this specific type of divestment, changing the approach without a clear explanation **points at an inconsistency** (see section 13.5.2).	There is a link between divestment-related commitments and divestments aimed at creating a new competitor. However, this link is **not consistently** made in the decisions (see section 13.5.3.3).
* The fact that restructuring plan provides for a **reduction of the balance sheet** size of the beneficiary bank.	The more general observation that the bank is subject to downsizing can be found in almost any decision. In that regard, there is **no inconsistency** (see section 13.6.2).	The percentage of the balance sheet reduction is not always mentioned in combination with the relative aid amount. This would indicate an **inconsistency** (see section 13.6.3).
* The fact that the bank will **reduce the number of branches**. * The fact that the bank will **reduce the number of employees**.	There are **no indications of an inconsistency** (see section 13.7.2).	The Commission did not take particular note of the exact modalities of this relevant characteristic. This would indicate an **inconsistency** (see section 13.7.3).
* The fact that the restructuring plan provides for a **growth limitation**.	It is difficult to establish whether the Commission has consistently taken into account this relevant characteristic (see section 13.8.2).	It is difficult to establish whether the Commission has consistently taken into account this relevant characteristic (see section 13.8.3).
* The fact that the beneficiary bank is subject to an **acquisition ban**.	Most decisions fit within the general pattern. In that regard, there is **no inconsistency** (see section 13.9.2).	Prior to the 2013 Banking Communication, the Commission did not take particular note of the exact modalities of the acquisition ban. This is **inconsistent** (see section 13.9.3).

* The fact that the beneficiary bank is subject to a **price leadership ban**. * The fact that the beneficiary bank is subject to other **pricing restrictions**.	Since the price leadership ban and the other pricing restrictions are not substitutes, the absence of a price leadership ban cannot be explained by the mere fact that the bank is subject to the other pricing restrictions. The finding that there are only 13 cases in which a price leadership ban was imposed, would seem to indicate an **inconsistency** (see sections 13.10.2 and 13.10.5).	To some extent, the Commission has taken into account the modalities of the price leadership ban. However, with respect to the standard of comparison, an explanation as to why a specific standard of comparison was chosen, was completely lacking. This is **inconsistent** (see section 13.10.3).
* The fact that the beneficiary bank is subject to a ban on **aggressive commercial** practices/ strategies.	There is a lot of vagueness regarding the use of these terms. Sometimes, they are used as synonyms; sometimes they are used as two distinct notions (see section 13.11.1).	There is a lot of vagueness regarding the use of these terms. Sometimes, they are used as synonyms; sometimes they are used as two distinct notions (see section 13.11.1).
* The fact that the restructuring plan includes a clear **repayments** schedule./The fact that the bank has already repaid (part of) the aid. * The fact that the Member State commits to **reprivatize** the beneficiary bank.	Exit from State aid is relevant in every case (irrespective of the form of aid). Consequently, the exit strategy should be taken into account in every case. There are **no indications of an inconsistency** (see section 13.12.2).	There are **no indications of an inconsistency** (see section 13.12.3).

Annex II: Number of bank State aid decisions

Member State	Number of decisions on bank support schemes	Number of decisions on ad hoc bank State aid cases	*Number of Restructuring Decisions*	Total number of decisions
Austria	5	15	*6*	20
Belgium	0	26	*5*	26
Bulgaria	1	1	*1*	2
Croatia	1	0	*0*	1
Cyprus	10	4	*2*	14
Denmark	19	14	*5*	33
Finland	7	0	*0*	7
France	5	4	*1*	9
Germany	9	34	*11*	43
Greece	22	24	*10*	46
Hungary	21	2	*2*	23
Ireland	28	21	*6*	49
Italy	10	17	*2*	27
Latvia	4	9	*2*	13
Lithuania	6	3	*2*	9
Luxembourg	0	3	*1*	3
Netherlands	4	17	*5*	21
Poland	31	0	*0*	31
Portugal	32	11	*6*	43
Slovakia	1	0	*6*	1
Slovenia	8	12	*0*	20
Spain	15	26	*13*	41
Sweden	9	2	*0*	11
United Kingdom	11	9	*5*	20
Total	**259**	**254**	***91***	**513**

Annex III: List of decisions on bank State aid cases

The following table provides a list of the decisions on bank State aid cases.[1] As the table clearly illustrates, almost every bank State aid case comprises several decisions. For each decision, the following information is provided in the table: the case number[2], the date of the decision, the type of decision (see section 3.6.1) and the subject of the decision (as indicated in the decision itself). The relevant context (see section 6.8) is indicated in the last column of the table. Because of the special focus on the restructuring (see section 6.9.1), the Restructuring Decisions are highlighted (in **bold**).

Austria

Bank	Case number	Date	Type of decision	Subject	Context
Osterreichische Volksbanken (OVAG)	SA.31883	9 December 2011	Opening decision	Restructuring of Osterreichische Volksbanken	
OVAG	**SA.31883**	**19 September 2012**	**Restructuring decision**	**Restructuring of Osterreichische Volksbanken**	**C**
OVAG	SA.31883	2 July 2015	Amendment decision	On the State aid which Austria implemented and is further planning to implement for ÖVAG and the Volksbanken Verbund and to amend the decision 2013/298/EU	

1. On its website, the Commission publishes an overview of decisions (and on-going in-depth investigations) in the context of the financial crisis. This overview was updated regularly.
2. The case number can be used to find the bank State aid decisions on the website of the Commission: http://ec.europa.eu/competition/state_aid/register/.

Bank	Case number	Date	Type of decision	Subject	Context
BAWAG	N640/ 2009	22 December 2009	Rescue decision	Rescue aid (capital injection and asset guarantee) to BAWAG	
BAWAG	**N261/2010**	**30 June 2010**	**Restructuring decision**	**Second[3] restructuring aid for BAWAG**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Hypo Tirol Bank	N241/ 2009	17 June 2009	Rescue decision	Aid measures provided to Hypo Tyrol Bank	
Hypo Tirol Bank	**SA.34716**	**4 October 2012**	**Restructuring decision**	**Rekapitalisierung und Umstrukturierung der Hypo Tirol Bank**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Hypo Group Alpe Adria (HGAA)	N254/ 2009	12 May 2009	Opening decision	BayernLB and Hypo Group Alpe Adria *[4]	
HGAA	N698/ 2009	23 December 2009	Prolongation decision	BayernLB and Hypo Group Alpe Adria	
HGAA	C16/2009	22 June 2010	Prolongation decision	Hypo Group Alpe Adria	
HGAA	SA.32172	19 July 2011	Prolongation decision	Hypo Group Alpe Adria	
HGAA	SA.32554	5 December 2012	Prolongation decision	Hypo Group Alpe Adria	
HGAA	**SA.32554**	**3 September 2013**	**Restructuring decision**	**Hypo Group Alpe Adria**	**S/C/W** *[5]

3. On 27 June 2007, the Commission had adopted a Restructuring Decision on BAWAG (case C50/2006). Since this decision concerned State aid granted before the financial crisis, the first Restructuring Decision on BAWAG falls outside the scope of the analysis.
4. HGAA was a subsidiary of BayernLB.
5. HGAA was split into (i) the Austrian bank (HBA), (ii) the SEE network and (iii) the wind-down part.

Bank	Case number	Date	Type of decision	Subject	Context
Kommunal-kredit Austria (KA)	**SA.32745**	**31 March 2011**	**Restructuring decision**	**Restructuring of Kommunalkredit Austria**	**S/C/W *[6]**
KA	**SA.32745**	**19 July 2013**	**Restructuring decision**	**State support for the run-off of Kommunalkredit Austria**	**W *[7]**

Belgium

Bank	Case number	Date	Type of decision	Subject	Context
KBC	N602/2008	18 December 2008	Rescue decision	The Belgian Aid to KBC	
KBC	C18/2009	30 June 2009	Opening decision	Second recapitalisation and asset relief for KBC	
KBC	**C18/2009**	**18 November 2009**	**Restructuring decision**	**Restructuring of KBC**	**C**
KBC	MC11/2009	16 December 2010	Amendment decision	Extension of the target date of certain divestments by KBC	
KBC	SA.29833, MC11/2009	27 July 2011	Amendment decision	Monitoring of KBC – Replacement of certain own contribution measures, change to divestment of Romstal and the extension of the deadline for the divestment KBL	
KBC	SA.29833, MC11/2009	22 December 2011	Amendment decision	Monitoring of KBC – Extension of the target date of certain divestments by KBC and Amendment of restructuring commitments	
KBC	SA.29833	20 December 2012	Amendment decision	Accelerated phasing-out of the State protection measure and amendments to the KBC's restructuring plan	

6. KA was split into a good bank (KA Neu) and a bad bank (KA Finanz).
7. Since it was not possible to privatise KA, the bank was wound-down.

Bank	Case number	Date	Type of decision	Subject	Context
Ethias	NN57/2008	12 February 2009	Rescue decision	Emergency aid for Ethias	
Ethias	**N256/2009**	**20 May 2010**	**Restructuring decision**	**Restructuring aid to Ethias**	**C**
Ethias	SA.30962	12 September 2011	Amendment decision	Monitoring of the implementation of the decision of 20 May 2010 on the aid to Ethias – Prolongation of divestment deadline Ethias Banque	
Ethias	SA.30962	12 June 2014	Amendment decision	Amendment to the restructuring plan of Ethias	
Ethias	SA.43306	23 October 2015	Amendment decision	Amendment to the restructuring plan of Ethias – Approval of issuance of additional subordinated debt	
Bank	Case number	Date	Type of decision	Subject	Context
Dexia	NN49/2008, NN50/2008, NN45/2008	19 November 2008	Rescue decision	Emergency aid to Dexia in the form of a guarantee for bonds and liquidity assistance	
Dexia	C9/2009	13 March 2009	Opening decision	Aid to Dexia in the form of guarantees for bonds and certain assets, liquidity assistance and a capital increase	
Dexia	C9/2009	30 October 2009 *[8]	Prolongation decision	Dexia	
Dexia	**C9/2009**	**26 February 2010**	**Restructuring decision**	**Restructuring of Dexia**	**C**
Dexia	SA.33751	17 October 2011	Opening decision	Rachat de Dexia Banque Belgique par l'Etat belge	
Dexia	SA.33760, SA.33763, SA.33764	21 December 2011	Opening decision	Mesure additionnelle au plan de restructuration de Dexia	

8. Not published on the Commission's website.

Dexia	SA.33760, SA.33763, SA.33764	31 May 2012 (I)	Prolongation decision	Additional measure to restructuring of Dexia	
Dexia	SA.33760, SA.33763, SA.33764	31 May 2012 (II)	*Other*	Additional measure to restructuring of Dexia	
Dexia	SA.34440	25 July 2012	Rescue decision	Sale of Dexia BIL *[9]	
Dexia	SA.34925	6 June 2012	Rescue decision	Augmentation du plafond de la garantie temporaire	
Dexia	SA.34925	26 September 2012	Opening decision	Deuxième prolonga-tion de la garantie temporaire sur refinancement de Dexia	
Dexia	**SA.33760, SA.33763, SA.33764, SA.30521, SA.26653, SA.34925, SA.34927, SA.34928**	**28 December 2012**	**Restructuring decision**	**Aide d'Etat mise a execution par le Royaume de Belgique, la Republique francaise et le Grand-Duche de Luxembourg**	**S/C/ T/ W** *[10]
Bank	Case number	Date	Type of decision	Subject	Context
Fortis	N574/2008	19 November 2008	Rescue decision	State guarantees for Fortis Bank	
Fortis	**NN42/2008 NN46/ 2008, NN53/2008**	**3 December 2008**	**Restructuring decision**	**Restructuring aid to Fortis Bank and Fortis Bank Luxembourg**	**S/C/T/ C** *[11]
Fortis	N255/ 2009, N274/2009	12 May 2009	Restructuring decision	Additional aid for Fortis Banque, Fortis Banque Luxembourg and Fortis holding	

9. NB: no new aid.
10. Dexia was split-up (S). DBB/Belfius was purchased by the Belgian State (C). NEC/DMA was purchased by the French State, the CDC and La Banque Postale (T) and set up as a development bank. Dexia was wound-down (W).
11. The Fortis Group was split-up (S). Fortis Bank Nederland was purchased by the Dutch State (C). Fortis Bank was sold by the Belgian State and eventually transferred to BNP Paribas (T). The remaining parts of Fortis Group continued to exist as Ageas (C).

Bank	Case number	Date	Type of decision	Subject	Context
Kaupthing Bank Luxembourg	**N344/ 2009, N380/2009**	**9 July 2009***	**Restructuring aid**	**Restructuring aid for Kaupthing Bank Luxembourg**	**S/T/ W***[12]

Bulgaria

Bank	Case number	Date	Type of decision	Subject	Context
First Investment Bank (FIB)	**SA.39854**	**25 November 2014**	**Restructuring decision**	**Restructuring plan of First Investment Bank (FIB)**	**C**

Cyprus

Bank	Case number	Date	Type of decision	Subject	Context
Cyprus Popular Bank	SA.34827	13 September 2012	Rescue decisions	Rescue recapitalisation of Cyprus Popular Bank	
Bank	Case number	Date	Type of decision	Subject	Context
Cooperative Credit Bank (CCB)	**SA.35334**	**24 February 2014**	**Restructuring decision**	**Recapitalisation and restructuring of the Cooperative Central Bank and of the Cooperative Credit Institutions**	**C**
Cooperative Central Bank	**SA.43367**	**18 December 2015**	**Restructuring decision**	**2015 Additional restructuring aid to the Cooperative Central Bank**	**C**
Cooperative Central Bank	SA.45051	27 April 2016		Final valuation of the Cooperative Central Bank Ltd, Cyprus	

12. The activities in Belgium were taken over by Crédit Agricole; the activities in Luxembourg were taken over by the UK investment firm Blackfish Capital; all other assets were transferred to a SPV.

Denmark

Bank	Case number	Date	Type of decision	Subject	Context
Amagerbanken	SA.32634	6 June 2011	Rescue decision	Rescue aid to Amagerbanken	
Amagerbanken	**SA.33485**	**25 January 2012**	**Restructuring decision**	**Restructur-ing plan of Amagerbanken**	**S/T/W**
Bank	Case number	Date	Type of decision	Subject	Context
Eik Banki (and Eik Bank Denmark)	**SA.31945**	**6 June 2011**	**Restructuring decision**	**Aid for the liquidation of Eik Banki and its subsidiary Eik Bank Denmark**	**S/T/W**
Bank	Case number	Date	Type of decision	Subject	Context
Fionia Bank	NN23/2009	20 May 2009	Rescue decision	Rescue aid to Fionia Bank	
Fionia Bank	**N560/2009**	**25 October 2010**	**Restructuring decision**	**Aid for the liquidation of Fionia Bank**	**S/T/W**
Fionia Bank	SA.33117	18 July 2011	Amendment decision	Revised commitments	
Bank	Case number	Date	Type of decision	Subject	Context
Roskilde Bank	NN36/2008	31 July 2008	Rescue decision	Roskilde Bank	
Roskilde Bank	**NN39/2008**	**5 November 2008**	**Restructuring decision**	**Aid for liquida-tion of Roskilde Bank**	**S/T/W**
Roskilde Bank	NN52/2010	24 May 2011	Amendment decision	Amendments to liquidation aid to Roskilde Bank	

Bank	Case number	Date	Type of decision	Subject	Context
FIH	SA.34445	29 June 2012	Opening decision	Transfer of property-related assets from FIH to the FSC	
FIH	**SA.34445**	**11 March 2014**	**Restructuring decision**	**Transfer of property-related assets from FIH to the FSC**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Vestjysk Bank/ Aarhus Lokalbank	SA.34423	25 April 2012	Rescue decision	Rescue decision for the merger of Vestjysk Bank and Aarhus Lokalbank	
Vestjysk Bank	SA.34720	4 December 2015	Opening decision	Aid for the restructuring of Vestjysk Bank	
Bank	Case number	Date	Type of decision	Subject	Context
Max Bank	SA.33639	7 October 2011	Rescue decision	Rescue aid for Max Bank	

Finland

Bank	Case number	Date	Type of decision	Subject	Context
Kaupthing Bank	NN2/2009	21 January 2009	Rescue decision	State measure involving arrangements with Kaupthing Bank h.f, Finnish Branch	

France

Bank	Case number	Date	Type of decision	Subject	Context
Banque Populaire/ Caisse d'Epargne	**N249/2009**	**8 May 2009**	**Rescue decision**	**Injection of capital into the institution to be created by the merger of the parent companies of the Caisse d'Épargne and Banque Populaire groups**	
Bank	Case number	Date	Type of decision	Subject	Context
Crédit Immobilier de France (CIF)	SA.35389	21 February 2013	Rescue decision	Aide au sauvetage du Crédit Immobilier de France	
Crédit Immobilier	SA.37075	14 August 2013	Rescue decision	Prolongation de la garantie temporaire et augmentation de son plafond maximal	
Crédit Immobilier	**SA.37029**	**27 November 2013**	**Restructuring decision**	**Aide à la liquidation ordonnée du Crédit Immobilier de France**	**W**
Bank	Case number	Date	Type of decision	Subject	Context
Dexia	*See: Belgium*				

Germany

Bank	Case number	Date	Type of decision	Subject	Context
BayernLB	N615/2008	18 December 2008	Rescue decision	State aid to BayernLB	
BayernLB	N254/2009	12 May 2009*	Opening decision	BayernLB and Hypo Group Alpe Adria *[13]	
BayernLB	N698/2009	23 December 2009*	Prolongation decision	BayernLB and Hypo Group Alpe Adria	
BayernLB	**SA.28487**	**(25 July 2012) 5 February 2013**	**Restructuring decision**	**Restructuring aid for BayernLB**	**C**

13.

Bank	Case number	Date	Type of decision	Subject	Context
Com-merzbank	**N244/2009**	**7 May 2009**	**Restructuring decision**	**Restructuring**	**C**
Commerzbank	SA.34539	30 March 2012	Amendment decision	Amendment to the restructuring plan of Commerbank	
Bank	Case number	Date	Type of decision	Subject	Context
Hypo Real Estate (HRE)	N44/2008	2 October 2008	Rescue decision	Rescue aid for Hypo Real Estate	
Hypo Real Estate	N196/2009	7 May 2009 *[14]	Opening decision	Hypo Real Estate	
Hypo Real Estate	C15/2009	24 July 2009	Opening decision	Hypo Real Estate	
Hypo Real Estate	C15/2009, N333/2009, N557/2009	13 November 2009	Prolongation decision	Hypo Real Estate – Extension of formal investigation procedure, and temporary find capital injections compatible	
Hypo Real Estate	N161/2010	19 May 2010	Rescue decision	Further recapitalisation of HRE	
Hypo Real Estate	C15/2009, N380/2010	24 September 2010	Prolongation decision	Extension of scope of formal investigation procedure, winding-up institution, additional SoFFin guarantees for HRE	
Hypo Real Estate	**C15/2009**	**18 July 2011**	**Restructuring decision**	**Restructuring**	**C**

14. NB: only a press release available.

Bank	Case number	Date	Type of decision	Subject	Context
HSH Nordbank	N264/2009	29 May 2009	Rescue decision	Rescue aid (recapitalisation and risk shield)	
HSH Nordbank	C29/2009	22 October 2009	Opening decision	HSH Nordbank	
HSH Nordbank	**SA.29338**	**20 September 2011**	**Restructuring decision**	HSH Nordbank	**C**
HSH Nordbank	SA.29338	21 June 2013	Opening decision	Increase of the second-loss guarantee for HSH Nordbank	
HSH Nordbank	SA.44910	2 May 2016 *[15]	Restructuring decision	Increase of the second-loss guarantee for HSH Nordbank	
Bank	Case number	Date	Type of decision	Subject	Context
IKB	C10/2008	27 February 2008 *[16]	Opening decision	IKB	
IKB	**C10/2008**	**21 October 2008**	**Restructuring decision**	**Umstrukturierung der IKB**	**C** *[17]
IKB	N639/2008	22 December 2008	Rescue decision	Guarantee for IKB	
IKB	N213/2009	15 May 2009	Amendment decision	Amendment of restructuring decision C10/2008	
IKB	N400/2009	17 August 2009	Rescue decision	Second liquidity guarantee for IKB	
Bank	Case number	Date	Type of decision	Subject	Context
Landesbank Baden-Wurttemberg (LBBW)	C17/2009	30 June 2009	Opening decision	Aid measures provided to LBBW	
LBBW	**C17/2009**	**15 December 2009**	**Restructuring decision**	**Recapitalisation and asset relief for LBBW**	**C**
LBBW	SA.30062, SA.31773	9 December 2013	Amendment decision	Amendment of LBBW restructuring plan	

15. The public version of this decision is not (yet) available.
16. NB: only a press release available.
17. NB: This case is labelled as C, even though KfW's shares in IKB were sold to Lone Star.

Bank	Case number	Date	Type of decision	Subject	Context
NordLB	NN34/2007	18 July 2007	Rescue decision	Capital contributions (no state aid)	
NordLB	N655/2008	22 December 2008	Rescue decision	Secured guaranteed medium-term note programme	
NordLB	N655/2008	10 September 2009	Rescue decision	Prolongation of secured guaranteed medium-term note programme	
NordLB	SA.33571	22 December 2011	Rescue decision	Rescue aid to NordLB	
NordLB	**SA.34381**	**25 July 2012**	**Restructuring decision**	**Restructuring aid to NordLB**	**C**
NordLB	SA.34381	22 August 2013	Amendment decision	Amendment to the restructuring plan of NordLB	
Bank	Case number	Date	Type of decision	Subject	Context
Sachsen LB	C9/2008	27 February 2008	Opening decision	Restructuring aid to Sachsen LB	
Sachsen LB	**C9/2008**	**4 June 2008**	**Restructuring decision**	**Restructuring aid to Sachsen LB**	**T *** [18]
Sachsen LB	*See LBBW*				
Bank	Case number	Date	Type of decision	Subject	Context
Sparkasse KölnBonn	C32/2009	4 November 2009	Opening decision	Sparkasse KölnBonn	
Sparkasse KölnBonn	**C32/2009**	**29 September 2010**	**Restructuring decision**	Sparkasse KölnBonn	**C**
Sparkasse KölnBonn	SA.31646	30 March 2011	Amendment decision	Sparkasse KölnBonn divestments to the City of Cologne	
Sparkasse KölnBonn	SA.31646	23 July 2013	Amendment decision	Anderung des Umstrukturi-erungsplans	

18. SachsenLB was sold to LBBW.

Bank	Case number	Date	Type of decision	Subject	Context
WestLB	NN19/2006	18 July 2007	Rescue decision	Capital contributions *[19]	
WestLB	NN25/2008	30 April 2008	Rescue decision	Risk shield	
WestLB	C43/2008	1 October 2008	Opening decision	The Commission notified Germany of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty.	
WestLB	**C43/2008**	**12 May 2009**	**Restructuring decision**	**Restructuring of WestLB** *[20]	**C**
WestLB	N531/2009	7 October 2009	Rescue decision	Assumption of risk for WestLB	
WestLB	C40/2009	22 December 2009	Opening decision	Additional aid for WestLB related to spin-off of assets	
WestLB	N249/2010	22 June 2010	Prolongation decision	Prolongation of temporary authorisation of additional aid for WestLB related to spin-off of assets	
WestLB	**C40/2009, C43/2008**	**20 December 2011**	**Restructuring decision**	**Umstrukturierung**	**W** *[21]

19. The capital contributions did not constitute State aid.
20. NB: this decision was repealed by the decision of 20 December 2011.
21. The Verbundbank was carved out from WestLB and transferred to Helaba. The remaining assets and liabilities of WestLB were transferred to the EAA (Erste Abwicklungsanstalt). WestLB was rebranded SPM Bank and was merely a service provider to the EAA.

Greece

Bank	Case number	Date	Type of decision	Subject	Context
Alpha Bank	SA.34823	27 July 2012	Opening decision	Recapitalisation of Alpha Bank by the Hellenic Financial Stability Fund	
Alpha Bank	**SA.34823, SA.36004, SA.37965, SA.37966, SA.37967**	**9 July 2014**	**Restructuring decision**	**Recapitalisation and Restructuring of Alpha Bank; Resolution of Cooperative Bank of Western Macedonia Bank, Evia Cooperative Bank and Cooperative Bank of Dodecanese through a transfer order to Alpha Bank**	**C**
Alpha Bank	**SA.43366**	**26 November 2015**	**Restructuring decision**	**Amendment of the restructuring plan approved in 2014 and granting of new aid to Alpha Bank**	**C**

Bank	Case number	Date	Type of decision	Subject	Context
EFG Eurobank	SA.34825	27 July 2012	Opening decision	Recapitalisation of EFG Eurobank by the Hellenic Financial Stability Fund	
Eurobank	**SA.34825, SA.36006, SA.34488, SA.31155**	**29 April 2014***	**Restructuring decision**	**Recapitalisation and Restructuring of Eurobank Ergasias; Restructuring aid to Proton Bank through creation and capitalisation of Nea Proton Bank and additional recapitalisation of New Proton Bank; Resolution of TT Hellenic Postbank through the creation of a bridge bank**	**C**
Eurobank	**SA.43363**	**26 November 2015**	**Restructuring decision**	**Amendment of the restructuring plan approved in 2014 and granting of new aid to Eurobank**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Piraeus Bank	SA.34122	28 December 2011	Rescue decision	Second recapitalisation of Piraeus Bank under the Greek recapitalisation scheme	
Piraeus Bank	SA.34826	27 July 2012	Opening decision	Recapitalisation of Piraeus Bank by the Hellenic Financial Stability Fund	
Piraeus Bank	**SA.34826, SA.36005**	**23 July 2014***	**Restructuring decision**	**Restructuring of Piraeus Bank**	**C**
Piraeus Bank	**SA.43364**	**29 November 2015**	**Restructuring decision**	**Amendment of the restructuring plan approved in 2014 and granting of new aid to Piraeus Bank**	**C**

Bank	Case number	Date	Type of decision	Subject	Context
National Bank of Greece (NBG)	SA.34824	27 July 2012	Rescue decision	Recapitalisation of National Bank of Greece by the Hellenic Financial Stability Fund	
National Bank of Greece	**SA.34824, SA.36007, SA.36658, SA.37156, SA.34534**	**23 July 2014**	**Restructuring decision**	**Recapitalisation and Restructuring of NBG; Resolution of First Business Bank and Probank through a transfer order to NBG; Resolution of Cooperative Bank of Lesvos-Limnos, Cooperative Bank of Achaia and Cooperative Bank of Lamia**	**C**
National Bank of Greece	**SA.43365**	**4 December 2015**	**Restructuring decision**	**Amendment of the restructuring plan approved in 2014 and granting of new aid to National Bank of Greece**	
Bank	Case number	Date	Type of decision	Subject	Context
T Bank	**SA.34115**	**16 May 2012**	**Restructuring decision**	**Resolution of T Bank (through a transfer order of its assets and liabilities to Hellenic Postbank)**	**S/T/W**

Bank	Case number	Date	Type of decision	Subject	Context
TT Hellenic Postbank	SA.31155	6 May 2013	Opening decision	State aid to TT Hellenic Postbank through the creation and the capitalisation of the *bridge bank* New TT Hellenic Postbank	
TT Hellenic Postbank	**SA.34825, SA.36006, SA.34488, SA.31155***	**29 April 2014***	**Restructuring decision**	**Recapitalisation and Restructuring of *Eurobank* Ergasias; Restructuring aid to Proton Bank through creation and capitalisation of Nea Proton Bank and additional recapitalisation of New Proton Bank; Resolution of *TT Hellenic Postbank* through the creation of a *bridge bank***	**S/T/W**

Bank	Case number	Date	Type of decision	Subject	Context
Nea Proton Bank	SA.34488	26 July 2012	Opening decision	Aid to Nea Proton Bank through creation and capitalisation of Nea Proton Bank, and initiation of the formal investigation	
Nea Proton Bank	**SA.34825, SA.36006, SA.34488*, SA.31155**	**29 April 2014***	**Restructuring decision**	**Recapitalisation and Restructuring of *Eurobank* Ergasias; Restructuring aid to Proton Bank through creation and capitalisation of *Nea Proton Bank* and additional recapitalisation of New Proton Bank; Resolution of *TT Hellenic Postbank* through the creation of a *bridge bank***	**S/T/W**
Bank	Case number	Date	Type of decision	Subject	Context
ATE Bank	**N429/2010**	**23 May 2011**	**Restructuring decision**	**Restructuring of ATE**	**C**
ATE Bank	**SA.35460**	**3 May 2013**	**Restructuring decision**	**Liquidation aid for ATE Bank resolution**	**S/T/W**
ATE Bank	SA.34826, SA.36005	23 July 2014*	Restructuring decision	Restructuring of Piraeus Bank	*[22]
Bank	Case number	Date	Type of decision	Subject	Context
Panellinia Bank	**SA.41503**	**16 April 2015**	**Restructuring decision**	**Resolution of Panellinia Bank through a transfer order to Piraeus Bank**	**T**

22. ATE was taken over by Pireaus Bank.

Bank	Case number	Date	Type of decision	Subject	Context
Cooperative Bank of Peloponnese	SA.43886	17 December 2015	Rescue decision	Resolution of Cooperative Bank of Peloponnese *[23]	(T)
Bank	Case number	Date	Type of decision	Subject	Context
Attica Bank	SA.46558	7 October 2016	Rescue decision	Liquidity support to Attica Bank	

Hungary

Bank	Case number	Date	Type of decision	Subject	Context
FHB Jelzalog-bank Nyrt	SA.29608 (C37/2010)	24 January 2011	Opening decision	Decision to initiate the formal investigation procedure	
FHB Jelza-logbank Nyrt	**SA.29608 (C37/2010)**	**22 February 2012**	**Restructuring decision**	**Recapitalisation of FHB Jelzalogbank Nyrt**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Magyar Kereskedelmi Bank (MKB Bank)	**SA.40441**	**16 December 2015**	**Restructuring decision**	**Restructuring of Magyar Kereskedelmi Bank**	**C**

Ireland

Bank	Case number	Date	Type of decision	Subject	Context
Anglo Irish Bank	N9/2009	14 January 2009	Rescue decision	Recapitalisation of the Anglo Irish Bank by the Irish State	
Anglo Irish Bank	N61/2009	16 February 2009	Rescue decision	Change of owners-hip of Anglo	
Anglo Irish Bank	N356/2009	26 June 2009	Rescue decision	Recapitalisation of Anglo by the Irish State	
Anglo Irish Bank	NN12/2009, C11/2010	31 March 2010	Opening decision	Second recapitalisa-tion of Anglo and restructuring of Anglo	

23. NB: no new aid.

Anglo Irish Bank	NN35/2010	10 August 2010	Rescue decision	Temporary approval of the third recapitalisation in favour of Anglo	
Anglo Irish Bank	SA.32057	21 December 2010	Rescue decision	Temporary approval of the fourth recapitalisation and guarantee in respect of certain liabilities in favour of Anglo	
Anglo Irish Bank/Irish Nationwide Building Society	**SA.32504, C11/2010**	**29 June 2011***	**Restructuring decision**	**Restructuring of Anglo/INBS**	**W**
Bank	Case number	Date	Type of decision	Subject	Context
Irish Nationwide Building Society (INBS)	NN11/2010	30 March 2010	Rescue decision	Rescue measure in favour of INBS	
INBS	NN50/2010	21 December 2010	Rescue decision	Second emergency recapitalisation in favour of INBS	
Anglo/INBS	**SA.32504, C11/2010**	**29 June 2011***	**Restructuring decision**	**Restructuring of Anglo/INBS**	**W**
Bank	Case number	Date	Type of decision	Subject	Context
Allied Irish Banks (AIB) AIB	N241/2009 N553/2010	12 May 2009 21 December 2010	Rescue decision Rescue decision	Recapitalisation of AIB by the Irish State Second emergency recapitalisation in favour of AIB	
AIB/EBS	SA.33296	15 July 2011*	Rescue decision	Emergency recapitalisation in favour of the merged entity AIB/EBS	
AIB/EBS	**SA.29786, SA.33296, SA.31891, N241/2009, N160/2010, C25/2010**	**7 May 2014***	**Restructuring decision**	**Restructuring of AIB/EBS**	**C**

Bank	Case number	Date	Type of decision	Subject	Context
Educational Building Society (EBS)	N160/2010	2 June 2010	Rescue decision	Recapitalisation of EBS	
EBS	C25/2010	11 October 2010	Opening decision	Restructuring of EBS	
AIB/EBS	SA.33296	15 July 2011*	Rescue decision	Emergency recapitalisation in favour of the merged entity AIB/EBS	
AIB/EBS	**SA.29786, SA.33296, SA.31891, N241/2009, N160/2010, C25/2010**	**7 May 2014***	**Restructuring decision**	**Restructuring of AIB/EBS**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Bank of Ireland	N149/2009	26 March 2009	Rescue decision	Recapitalisation of BOI by the Irish State	
Bank of Ireland	**N546/2009**	**15 July 2010**	**Restructuring decision**	**(first) restructuring of BOI**	**C**
Bank of Ireland	SA.33216	11 July 2011	Rescue decision	Second rescue of BOI	
Bank of Ireland	**SA.33443**	**20 December 2011**	**Restructuring decision**	**Second restructuring of BOI**	**C**
Bank of Ireland	SA.36784	9 July 2013	Amendment decision	Amendment of commitments	
Bank	Case number	Date	Type of decision	Subject	Context
Irish Life & Permanent Group (Permanent Trustee Savings Bank – PTSB)	SA.33311	20 July 2011	Rescue decision	Rescue recapitalisation in favour of IL&P	
IL&P (PTSB)	**SA.33442**	**9 April 2015**	**Restructuring decision**	**Restructuring of IL&P**	**C**

Bank	Case number	Date	Type of decision	Subject	Context
Quinn Insurance	**SA.33023**	**12 October 2011**	**Restructuring decision**	**Restructuring of Quinn Insurance Ltd through the contribution of the Insurance Compensation Fund**	**S/T/W**

Italy

Bank	Case number	Date	Type of decision	Subject	Context
Banca Monte dei Paschi di Siena (MPS)	SA.35137	17 December 2012	Rescue decision	Rescue aid to Monte dei Paschi di Siena S.p.A.	
MPS	**SA.36175**	**27 November 2013**	**Restructuring decision**	**Restructuring of MPS**	**C**
MPS	SA.47081	16 December 2016 *[24]	-	Request for liquidity support by BMPS	
MPS	SA.47677	4 July 2017 *[25]	-	New aid and amended restructuring plan of Banca Monte dei Paschi di Siena	
Bank	Case number	Date	Type of decision	Subject	Context
Banca Romagna Cooperativa (BRC)	**SA.41924**	**2 July 2015**	**Restructuring decision**	**Resolution (via liquidation) of Banca Romagna Cooperativa – Credito Cooperativo Centro e Macerone – Societa Cooperativa**	**S/T/W**

24. The public version of this decision is not (yet) available.
25. The public version of this decision is not (yet) available.

Bank	Case number	Date	Type of decision	Subject	Context
Banca Tercas	SA.39451	27 February 2015	Opening decision	State support to Banca Tercas	
Banca Tercas	SA.39451	23 December 2015	Recovery decision	Aid to Banca Tercas	
Bank	Case number	Date	Type of decision	Subject	Context
Banca Marche, Banca Etruria, Carife and Carichieti	SA.39543 SA.41134 SA.41925 SA.43547	22 November 2015 *[26]	-	Resolution	
Banca Marche, Banca Etruria, Carife and Carichieti	SA.39543 SA.41134 SA.41925 SA.43547	29 April 2016 *[27]	-	Resolution	
Banca Marche, Banca Etruria, Carife and Carichieti	SA.39543 SA.41134 SA.41925 SA.43547	7 October 2016 *[28]	-	Resolution	
Banca Marche, Banca Etruria, Carife and Carichieti	SA.39543 SA.41134 SA.41925 SA.43547	30 April 2017 *[29]	-	Resolution	
Bank	Case number	Date	Type of decision	Subject	Context
Banca Popolare di Vicenza	SA.47149	18 January 2017 *[30]	-	Liquidity support to Banca Popolare di Vicenza	
Banca Popolare di Vicenza	SA.47940	12 April 2017 *[31]	-	Additional liquidity support to Banca Popolare di Vicenza	
Banca Popolare di Vicenza	SA.45664	25 June 2017 *[32]	-	Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca – Liquidation aid	

26. The public version of this decision is not (yet) available.
27. The public version of this decision is not (yet) available.
28. The public version of this decision is not (yet) available.
29. The public version of this decision is not (yet) available.
30. The public version of this decision is not (yet) available.
31. The public version of this decision is not (yet) available.
32. The public version of this decision is not (yet) available.

Bank	Case number	Date	Type of decision	Subject	Context
Veneto Banca	SA.47150	18 January 2017 *[33]	-	Liquidity support to Veneto Banca	
Veneto Banca	SA.47941	12 April 2017 *[34]	-	Additional liquidity support to Veneto Banca	
Veneto Banca	SA.45664	25 June 2017 *[35]	-	Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca – Liquidation aid	

Latvia

Bank	Case number	Date	Type of decision	Subject	Context
Parex banka	NN68/2008	24 November 2008	Rescue decision	Public support measures to Parex Banka	
Parex banka	NN3/2009	11 February 2009	Rescue decision	Modifications to the public support measures to Parex	
Parex banka	N189/2009	11 May 2009	Rescue decision	Modifications to the public support measures to Parex	
Parex banka	C26/2009	29 July 2009	Opening decision	Restructuring aid to Parex Banka	
Parex banka	**C26/2009**	**15 September 2010**	**Restructuring decision**	**Restructuring**	**S/C/W** *[36]
Parex banka	SA.34747	10 August 2012	Amendment decision	Amendments to Parex restructuring plan	

33. The public version of this decision is not (yet) available.
34. The public version of this decision is not (yet) available.
35. The public version of this decision is not (yet) available.
36. Parex banka was split into a newly established so-called ‘good bank’ (Citadele banka), which would take over all core assets and some non-core assets, and a so-called ‘bad bank’ (Reverta).

Parex banka	SA.36612	16 April 2014	Opening decision	Aid granted by Latvia to Citadele banka and AS Reverta (formerly known as AS Parex banka) as well as misuse of aid	
Parex banka	SA.36612	9 July 2014	Amendment/ Restructuring decision	Aid granted by Latvia to Citadele banka and AS Reverta (formerly known as AS Parex banka) as well as misuse of aid	
Bank	Case number	Date	Type of decision	Subject	Context
Latvia Mortgage and Land Bank (MLB)	NN60/2009	19 November 2009	Rescue decision	Recapitalisation of the Mortgage and Land Bank of Latvia	
Latvia Mortgage and Land Bank	SA.30704	26 January 2012	Opening decision	Additional aid measures to the Latvia Mortgage and Land Bank	
MLB (commercial segment)	**SA.30704**	**17 July 2013**	**Restructuring decision**	**Additional aid measures to the Latvia Mortgage and Land Bank**	**S/T/W ***[37]
MLB (development segment)	SA.36904	9 June 2015	*Other*	MLB development segment and creation of the Latvian Single Development Institution	

37. The commercial segment of MLB was sold in bundles.

Lithuania

Bank	Case number	Date	Type of decision	Subject	Context
Lithuania's Central Credit Unions (LCCU)	**SA.34208**	**26 September 2012**	**Restructuring decision**	**Rescue and restructuring of Lithuanian Central Credit Union**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
AB Ukio Bankas	**SA.36248**	**14 August 2013**	**Restructuring decision**	**Liquidation aid for the resolution of AB Ukio Bankas**	**S/T/W**
AB Ukio Bankas	SA.38664	17 July 2014	*Other*	Additional notification to SA.36248 – Liquidation aid for resolution of AB Ukio Bankas	

Luxembourg

Bank	Case number	Date	Type of decision	Subject	Context
Kaupthing Bank Luxembourg	**N344/2009, N380/2009**	**9 July 2009***	**Restructuring decision**	**Restructuring aid for Kaupthing Bank Luxembourg**	**S/T/W** *[38]
Bank	Case number	Date	Type of decision	Subject	Context
Dexia BIL				*No State aid*	

Netherlands

Bank	Case number	Date	Type of decision	Subject	Context
ABN AMRO	*NN42/2008, NN46/2008, NN53/2008*	*3 December 2008*	*Restructuring decisions*	*Restructuring aid to Fortis Bank and Fortis Bank Luxembourg* *[39]	
ABN AMRO	C11/2009	8 April 2009	Opening decision	Alleged aid to Fortis Bank Nederland and the ABN earmarked activities	

38. The activities in Belgium were taken over by Crédit Agricole; the activities in Luxembourg were taken over by the UK investment firm Blackfish Capital; all other assets were transferred to a SPV.
39. NB: this decision did not cover the aid to Fortis Bank Nederland.

ABN AMRO	C11/2009	5 February 2010	Prolongation decision	Extension of procedure in State aid case C11/2009 (Alleged aid to Fortis Bank Nederland and ABN Amro) to cover the additional recapitalisation measures in favour of Fortis Bank Nederland and ABN Amro and temporary approval until 31 July 2010	
ABN AMRO	C11/2009	30 July 2010	Prolongation decision	Prolongation of the temporary approval of additional State support to Fortis Bank Nederland and ABN AMRO	
ABN AMRO	**C11/2009**	**5 April 2011**	**Restructuring decision**	**ABN AMRO Group (created following the merger between Fortis Bank Nederland and ABN AMRO N)**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
ING	N528/2008	12 November 2008	Rescue decision	Steun aan ING Groep NV	
ING	C10/2009	31 March 2009	Opening decision	Illiquid assets back-up facility for ING	
ING	C10/2009	15 September 2009 *[40]	Prolongation decision	ING	
ING	N627/2009	17 November 2009	*Other*	Revocation of extension of opening of formal investigations and prolongation of temporary authorisation of illiquid assets back-up facility for ING	

40. Only a press release available.

ING	**C10/2009**	**18 November 2009**	**Restructuring decision**	**ING's Illiquid Assets Back-Up Facility and Restructuring Plan**	**C**
ING	SA.28855	11 May 2012	Restructuring decision	Restructuring aid	
ING	SA.33305, SA.29832	11 May 2012	Opening decision	Renotification of recapitalisation aid to ING and implementation of the October 2009 restructuring commitments	
ING	SA.33305, SA.29832	16 November 2012	Restructuring decision	Restructuring of ING	C
ING	SA.29832	5 November 2013	Amendment decision	Amendment to the restructuring plan of ING	
ING	SA.29832	11 December 2013	*Other*	IABF Termination	
Bank	Case number	Date	Type of decision	Subject	Context
SNS REAAL	N611/2008	10 December 2008	Rescue decision	Aid to SNS REAAL	
SNS REAAL	**N371/2009**	**28 January 2010**	**Restructuring decision**	**Viability plan SNS REAAL**	**C**
SNS REAAL	SA.33303	19 December 2011	*Other*	Renotification capital injection of SNS REAAL	
SNS REAAL	SA.35382	22 February 2013	Rescue decision	Rescue of SNS REAAL	
SNS REAAL	**SA.36598**	**19 December 2013**	**Restructuring decision**	**Restructuring of SNS REAAL**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Aegon	N569/2008	27 November 2008	Rescue decision	State aid to Aegon	
Aegon	**N372/2009**	**17 August 2010**	**Restructuring decision**	**Restructuring aid to Aegon**	**C**

Portugal

Bank	Case number	Date	Type of decision	Subject	Context
Banco Privado Portugues (BPP)	NN71/2008	13 March 2009	Rescue decision	State aid to BPP	
BPP	C33/2009	10 November 2009	Opening decision	Restructuring of Banco Privado Portugues	
BPP	C33/2009	20 July 2010	Recovery decision	On the State aid implemented by Portugal in the form of a State guarantee to BPP	
Bank	Case number	Date	Type of decision	Subject	Context
Caixa Geral de Depositos (CGD)	SA.35062	18 July 2012	Rescue decision	Recapitalisation of Caixa Geral de Depositos	
CGD	SA.35062	18 December 2012	Opening decision	Breach of a dividend ban by CGD. Misuse of rescue aid	
CGD	**SA.35062**	**24 July 2013**	**Restructuring decision**	**Restructuring of CGD**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
BPI	**SA.35238**	**24 July 2013**	**Restructuring decision**	**Restructuring of BPI**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Banco Comercial Portugues (BCP)	**SA.34724**	**30 August 2013**	**Restructuring decision**	**Restructuring of the BCP Group**	**C**

Bank	Case number	Date	Type of decision	Subject	Context
Banco Portugues de Negocios (BPN)	SA.26909	24 October 2011	Opening decision	Nationalisation and Restructuring of Banco Portugues de Negocios	
BPN	**SA.26909**	**27 March 2012**	**Restructuring decision**	**Restructuring of Banco Portugues de Negocios**	**T** *[41]
Bank	Case number	Date	Type of decision	Subject	Context
Banco Espirito Santo (BES)	**SA.39250**	**3 August 2014**	**Restructuring Decision**	**Resolution of Banco Espirito Santo**	**S/C/W**
BES	SA.43976	19 December 2015	Amendment decision	Amendment of the 2014 Resolution for Portuguese Banco Espírito Santo	
Bank	Case number	Date	Type of decision	Subject	Context
Banif	SA.34662	21 January 2013	Rescue decision	Recapitalisation of Banif (Banco Internacional do Funchal)	
Banif	SA.36123	24 July 2015	Opening decision	Recapitalisation of Banif	
Banif	**SA.43977**	**21 December 2015**	**Restructuring Decision**	**Resolution of Banif**	**S/T/W** *[42]

41. As at 31 December 2011, the BPN was held by the State, its sole shareholder. The Bank was re-privatised in 2012, with the shareholders of Banco BIC having acquired the entirety of its share capital during the first half of 2012. In this context, in June 2012, the group of shareholders which thus held and controlled BPN and BIC deliberated, for reasons of economic rationale, the incorporation of the latter into the former, through a merger by incorporation, with the consequent extinction of BIC.
42. Banif was split into a clean bank ("Clean Bank") and a remaining bank ("Remaining Bank"). The Clean Bank has been sold to another bank (Banco Santander Totta). In addition: a separate asset bundle for sale to another third party had been carved out in resolution into an Asset Management Company ("Carve-out").

Slovenia

Bank	Case number	Date	Type of decision	Subject	Context
Abanka	SA.37690	18 December 2013	Rescue decision	Rescue aid in favour of Abanka	
Abanka	**SA.38228**	**13 August 2014**	**Restructuring decision**	**Restructuring of Abanka**	**C**
Abanka/ Banka Celje	**SA.38522**	**16 December 2014**	**Restructuring decision**	**Restructuring aid for Banka Celje/Abanka**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Nova Kreditna Banka Maribor (NKBM)	SA.35709	20 December 2012	Rescue decision	Recapitalisation of NKBM	
NKBM	**SA.35709**	**18 December 2013**	**Restructuring decision**	**Restructuring of NKBM**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Nova Ljubljanska banka (NLB)	SA.32261	7 March 2011	Rescue decision	Rescue recapitalisation in favour of NLB	
NLB	SA.34937, SA.33229	2 July 2012	Opening decision	Second recapitalisation	
NLB	**SA.33229**	**18 December 2013**	**Restructuring decision**	**Restructuring of NLB**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Factor Banka	SA.37315	6 September 2013	Rescue decision	Rescue aid in favour of Factor Banka	
Factor Banka	**SA.37643**	**18 December 2013**	**Restructuring decision**	**Orderly winding down of Factor Banka**	**W**
Bank	Case number	Date	Type of decision	Subject	Context
Probanka	SA.37314	6 September 2013	Rescue decision	Rescue aid in favour of Probanka	
Probanka	**SA.37642**	**18 December 2013**	**Restructuring decision**	**Orderly winding down of Probanka**	**W**

Spain

Bank	Case number	Date	Type of decision	Subject	Context
Catalunya Banc	SA.33103	30 September 2011	Rescue decision	Recapitalisation of Catalunya Banc	
Catalunya Banc	**SA.33735**	**28 November 2012**	**Restructuring decision**	**Restructuring of Catalunya Banc**	**C**
Catalunya Banc	SA.39402	17 December 2014	Amendment decision	Restructuring of Catalunya Banc through its acquisition by BBVA *[43]	T
Bank	Case number	Date	Type of decision	Subject	Context
Novacaixagalicia (NCG) Banco	SA.33096	30 September 2011	Rescue decision	Recapitalisation of NCG Banco	
NCG Banco	**SA.33734**	**28 November 2012**	**Restructuring decision**	**Restructuring of NCG**	**C**
NCG Banco	SA.38143	20 June 2014	Amendment decision	Restructuring of NCG through its acquisition by Banesco Group *[44]	T
Bank	Case number	Date	Type of decision	Subject	Context
BFA Group	SA.34820	27 June 2012	Rescue decision	Rescue aid to BFA (“Conversion Decision”)	
BFA Group	SA.35369	7 September 2012	Rescue decision	Urgent recapitalisation of BFA	
BFA Group	**SA.35253**	**28 November 2012**	**Restructuring decision**	**Restructuring and Recapitalisation of the BFA Group**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Banco Mare Nostrum (BMN)	**SA.35488**	**20 December 2012**	**Restructuring decision**	**Restructuring of Banco Mare Nostrum**	**C**
Bank	Case number	Date	Type of decision	Subject	Context
Liberbank	**SA.35490**	**20 December 2012**	**Restructuring decision**	**Restructuring of Liberbank**	**C**

43. NB: no new aid.
44. NB: no new aid.

Bank	Case number	Date	Type of decision	Subject	Context
Banco de Valencia	SA.33917	21 November 2011	Rescue decision	Recapitalisation and Liquidity support for Banco de Valencia	
Banco de Valencia	**SA.34053**	**28 November 2012**	**Restructuring decision**	**Recapitalisation and Restructuring of Banco de Valencia**	**T** *[45]
Bank	Case number	Date	Type of decision	Subject	Context
Banco CAM	SA.33402	24 July 2011	Rescue decision	Recapitalisation of the CAM Group	
Banco CAM	**SA.34255**	**30 May 2012**	**Restructuring decision**	**Restructuring of CAM and Banco CAM**	**T** *[46]
Bank	Case number	Date	Type of decision	Subject	Context
UNNIM Banc	SA.33095	30 September 2011	Rescue decision	Recapitalisation of UNNIM Banc	
UNNIM Banc	**SA.33733**	**25 July 2012**	**Restructuring decision**	**Restructuring of UNNIM Banc SAU**	**T** *[47]
Bank	Case number	Date	Type of decision	Subject	Context
Banco Grupo Cajatres	**SA.35489**	**20 December 2012**	**Restructuring decision**	**Restructuring of Banco Grupo Cajatres**	**T** *[48]
Bank	Case number	Date	Type of decision	Subject	Context
Banco Gallego	**SA.36500**	**25 July 2013**	**Restructuring decision**	**Recapitalisation and Restructuring of Banco Gallego**	**T** *[49]

45. CaixaBank purchased all the **shares** of the FROB in BVA at a price of EUR 1.
46. On 1 June 2012 Banco Sabadell completed the acquisition of 100% of the **shares** of Banco CAM. A few months later, on 5 December, the merger of Banco CAM by absorption into Banco Sabadell was officially registered, although the effective date of the merger for accounting purposes was 1 June 2012.
47. Through a share sale purchase agreement, BBVA purchased 100% of the **shares** of Unnim for €1.
48. During 2014 a ***merger by absorption*** took place between Ibercaja Banco, S.A. (acquiring company) and Banco Grupo Cajatres, S.A.U. (target company) after 100% of the shares in Banco Grupo Cajatres, S.A.U. had been acquired by Ibercaja Banco, S.A.
49. Banco Sabadell purchased 100% of the **shares** in Banco Gallego, S.A. for a consideration of one euro.

Bank	Case number	Date	Type of decision	Subject	Context
CajaSur	N202/2010	23 May 2010	Rescue decision	Recapitalisation of CajaSur	
CajaSur	**N392/2010**	**8 November 2010**	**Restructuring decision**	**Restructuring of CajaSur**	**T**
Bank	Case number	Date	Type of decision	Subject	Context
Caja Castilla La Mancha (CCM)	**NN61/2009**	**29 June 2010**	**Restructuring decision**	**Rescue and restructuring of Caja Castilla La Mancha**	**S/T/W**
Bank	Case number	Date	Type of decision	Subject	Context
Banco CEISS	**SA.34536**	**20 December 2012**	**Restructuring decision**	**Restructuring and Recapitalisation of Banco CEISS**	**C**
Banco CEISS	**SA.36249**	**13 May 2013**	**Amendment/ Restructuring decision**	**Restructuring of Banco CEISS through integration with Unicaja Banco**	**T**
Banco CEISS	SA.36249	25 July 2013	Amendment decision	Amendment of the Restructuring of CEISS through integration with Unicaja Banco *[50]	
Banco CEISS	**SA.36249**	**12 March 2014**	**Amendment/ Restructuring decision**	**Amendment of the Restructuring of CEISS through integration with Unicaja Banco**	**T**

Sweden

Bank	Case number	Date	Type of decision	Subject	Context
Carnegie Investment Bank	NN64/2008	15 December 2008	Rescue decision	Rescue aid to Carnegie Bank	
Carnegie Investment Bank *[51]	NN18/2010	12 May 2010	Restructuring decision	Omstrukturerings-stöd till Carnegie Investment Bank	T

50. NB: no new aid.
51. Since this decision is available only in the Swedish language, this decision is not included in my analysis.

United Kingdom

Bank	Case number	Date	Type of decision	Subject	Context
Lloyds Banking Group (LBG)	**N428/2009**	**18 November 2009**	**Restructuring decision**	**Restructuring of Lloyds Banking Group**	**C**
Lloyds Banking Group	SA.29834	13 May 2014	Amendment decision	Amendment to the restructuring plan of Lloyds Banking Group	
Bank	Case number	Date	Type of decision	Subject	Context
Royal Bank of Scotland (RBS)	**N422/2009, N621/2009**	**14 December 2009**	**Restructuring decision**	**Restructuring of RBS following its recapitalisation by the State and its participation in the Asset Protection Scheme**	**C**
Royal Bank of Scotland	SA.38304	9 April 2014	Amendment decision	Amendment to the restructuring plan of RBS	
Royal Bank of Scotland	SA.47702	4 April 2017	Amendment decision	Alternative package to replace the commitment for the Royal Bank of Scotland to divest the Rainbow business	
Bank	Case number	Date	Type of decision	Subject	Context
Bradford & Bingley	NN41/2008	1 October 2008	Rescue decision	Rescue aid to Bradford&Bingley	S/T/W
Bradford & Bingley	**N194/2009**	**25 January 2010**	**Restructuring decision**	**Liquidation aid to Bradford&Bingley**	**S/T/W**
Bradford & Bingley	SA.29731, SA.30326	22 September 2014*	Amendment decision	Northern Rock and Bradford&Bingley; amendment of commitments	

Bank	Case number	Date	Type of decision	Subject	Context
Northern Rock	NN70/2007	5 December 2007	Rescue decision	Rescue aid to Northern Rock	
Northern Rock	C14/2008	2 April 2008	Opening decision	Restructuring aid to Northern Rock	
Northern Rock	C14/2008	7 May 2009	Prolongation decision	Restructuring aid to Northern Rock	
Northern Rock	**C14/2008**	**28 October 2009**	**Restructuring decision**	**Restructuring aid to Northern Rock**	**S/C/W**
Northern Rock	SA.29731, SA.30326	22 September 2014*	Amendment decision	Northern Rock and Bradford&Bingley; amendment of commitments	
Bank	Case number	Date	Type of decision	Subject	Context
Dunfermline Building Society	**NN19/2009**	**25 January 2010**	**Restructuring decision**	**Restructuring aid to Dunfermline Building Society**	**S/T/W**

Annex IV: Overview of the compatibility-assessment

The following tables provide two useful insights:

- In the first place, the tables indicate *in which instances the compatibility-assessment comprises two stages*.
- In the second place, the tables indicate *in which instances a restructuring plan is required*.

Two-stage compatibility-assessment
As set out in section 8.1.1, the two-stage compatibility-assessment entailed the following. First, the Commission would assess whether the aid was appropriate, necessary and proportionate. Afterwards, when a restructuring plan for the beneficiary bank had been submitted, the Commission assessed whether the restructuring plan met the three objectives of restoring the long-term viability of the bank, ensuring burden-sharing and minimising competition distortions.

Restructuring plan required?
As set out in section 10.2, the question whether a restructuring plan is required is influenced by three factors: i) the type of State aid measure, ii) the question whether the aid is granted under a scheme or as ad hoc aid, iii) the Communications that are in force at the moment the aid was granted to the bank. These three factors interact with each other. For that reason, a distinction should be made on three levels.

In the first place, since there are essentially three types of State aid – i.e. recapitalisation measures, asset relief measures and guarantees – there are three different tables. Each table concerns one specific type of aid.

In the second place, a distinction is made between aid granted under a scheme and ad hoc aid. NB: this distinction will only be made with respect to recapitalisation measures and asset relief measures. The need to submit a restructuring plan in case of an ad hoc guarantee will not be discussed, for the following two reasons. First, guarantees are almost always granted in the context of a guarantee scheme. And second, in the rare cases that a bank benefits from an ad hoc guarantee, the bank also benefits from other State aid measures and a restructuring plan is already required.

In the third place, there are three policy documents – i.e. the DG Competition Staff Working Document of 30 April 2010, the First Prolongation Communication and the 2013 Banking Communication and – that changed the requirements to submit a restructuring plan. For that reason, a distinction is made between the situation before and the situation after the adoption of each of these policy documents.

Recapitalisation measures

The situation after the adoption of the 2008 Banking Communication and the Recapitalisation Communication			
Aid under a scheme		Ad hoc aid	
Fundamentally sound	Distressed	Fundamentally sound	Distressed
A ***fundamentally sound*** bank receives a capital injection under a ***scheme***.	A ***distressed*** bank receives a capital injection under a ***scheme***.	A ***fundamentally sound*** bank receives an ***ad hoc*** capital injection.	A ***distressed*** bank receives an ***ad hoc*** capital injection.
<u>First stage</u>: The Commission assessed (when the Member State notified the scheme to the Commission) whether the scheme was appropriate, necessary and proportionate. The Member State **has to submit a report/review on the use of the scheme**.[52] This review includes details of all banks that have benefited from the scheme. <u>Second stage</u>: *there is no second stage.*	<u>First stage</u>: The Commission assessed (when the Member State notified the scheme to the Commission) whether the scheme was appropriate, necessary and proportionate. Aid under the scheme is temporarily approved. Within 6 months of the recapitalisation, the Member State **has to submit a restructuring plan** for the beneficiary bank.[53] <u>Second stage</u>: the Commission assesses the restructuring plan.	<u>First stage</u>: The Commission assesses whether the aid is appropriate, necessary and proportionate. If this is the case, the aid is temporarily approved, on the condition that the Member State **submits a viability plan** within 6 months of the recapitalisation. <u>Second stage</u>: the Commission assesses the viability plan.	<u>First stage</u>: The Commission assesses whether the aid is appropriate, necessary and proportionate. If this is the case, the aid is temporarily approved, on the condition that the Member State **submits a restructuring plan** within 6 months of the recapitalisation.[54] <u>Second stage</u>: the Commission assesses the restructuring plan.

52. Pursuant to point 40 of the Recapitalisation Communication.
53. Pursuant to point 44 of the Recapitalisation Communication.
54. Pursuant to point 44 of the Recapitalisation Communication.

<table>
<tr><th colspan="4">The situation after the adoption of the First Prolongation Communication</th></tr>
<tr><td>A fundamentally sound bank receives a capital injection under a scheme.</td><td>A distressed bank receives a capital injection under a scheme.</td><td>A fundamentally sound bank receives an ad hoc capital injection.</td><td>A distressed bank receives an ad hoc capital injection.</td></tr>
<tr><td colspan="2"><u>First stage</u>: The Commission assessed (when the Member State notified the scheme to the Commission) whether the scheme was appropriate, necessary and proportionate.

Within 6 months, the Member State has to submit a restructuring plan for the beneficiary bank – irrespective of whether the bank is fundamentally sound or distressed.[55]

<u>Second stage</u>: the Commission assesses the restructuring plan.</td><td colspan="2"><u>First stage</u>: The Commission assesses whether the aid is appropriate, necessary and proportionate.

If this is the case, the aid is temporarily approved, on the condition that the Member State submits a restructuring plan – irrespective of whether the bank is fundamentally sound or distressed.[56]

<u>Second stage</u>: the Commission assesses the restructuring plan.</td></tr>
</table>

55. Pursuant to point 14 of the First Prolongation Communication.
56. Pursuant to point 14 of the First Prolongation Communication.

<table>
<tr><th colspan="4">The situation after the adoption of the 2013 Banking Communication</th></tr>
<tr><th>A fundamentally sound bank receives a capital injection under a scheme.</th><th>A distressed bank re ceives a capital injection under a scheme.</th><th>A fundamentally sound bank receives an ad hoc capital injection.</th><th>A distressed bank receives an ad hoc capital injection.</th></tr>
<tr><td colspan="2">NB: a recapitalisation scheme is only possible for small banks (i.e. banks with a balance sheet of not more than EUR 100 million).[57]

Every six months, the Member State must submit a report on the use of the scheme.</td><td colspan="2">First stage: recapitalisation measures are no longer approved on a temporary basis, so there is no first stage.

The Member State should submit a capital raising plan[58] and a restructuring plan.[59]

Second stage: the recapitalisation is authorised only after the Commission has approved the restructuring plan.[60]

NB: the recapitalisation can exceptionally be approved on a temporary basis as rescue aid.[61] This assessment corresponds to the first stage.

The Member State has to submit a restructuring plan within 2 months. In the second stage, the Commission assesses the restructuring plan.</td></tr>
</table>

57. Pursuant to points 54-55 of the 2013 Banking Communication.
58. Pursuant to point 29 of the 2013 Banking Communication.
59. Pursuant to point 30 of the 2013 Banking Communication.
60. See point 34 of the 2013 Banking Communication.
61. Pursuant to points 50-53 of the 2013 Banking Communication.

Impaired asset measures

The situation after the adoption of the 2008 Banking Communication and the Impaired Assets Communication (IAC)			
Aid under a scheme		Ad hoc aid	
Fundamentally sound	Distressed	Fundamentally sound	Distressed
A ***fundamentally sound*** bank benefits from an asset relief measure under a ***scheme***.	A ***distressed*** bank benefits from an asset relief measure under a ***scheme***.	A ***fundamentally sound*** bank benefits from an ad hoc asset relief measure.	A ***distressed*** bank benefits from an ad hoc asset relief measure.
First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the scheme was line with the IAC-criteria. The Member State has to submit a **viability plan** within 3 months from the bank's accession to the asset relief scheme.[62] Second stage: The Commission assesses the viability plan.	First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the scheme was line with the IAC-criteria. The Member State has to submit a **restructuring plan** within 3 months from the bank's accession to the asset relief scheme.[63] Second stage: The Commission assesses the restructuring plan.	First stage: The Commission assesses whether the aid is in line with the IAC-criteria. If this is the case, the aid is temporarily approved, on the condition that the Member State submits a **viability plan**. Second stage: the Commission assesses the viability plan.	First stage: The Commission assesses whether the aid is in line with the IAC-criteria. If this is the case, the aid is temporarily approved, on the condition that the Member State submits a **restructuring plan**. Second stage: the Commission assesses the restructuring plan.

62. Pursuant to Annex V of the IAC.
63. Pursuant to Annex V of the IAC.

<table>
<tr><th colspan="4">The situation after the adoption of the First Prolongation Communication</th></tr>
<tr><td>A fundamentally sound bank benefits from an asset relief measure under a scheme.</td><td>A distressed bank benefits from an asset relief measure under a scheme.</td><td>A fundamentally sound bank benefits from an ad hoc asset relief measure.</td><td>A distressed bank benefits from an ad hoc asset relief measure.</td></tr>
<tr><td colspan="2"><u>First stage</u>: The Commission assessed (when the Member State notified the scheme to the Commission) whether the scheme was line with the IAC-criteria.

The Member State has to submit a restructuring plan – irrespective of whether the bank is fundamentally sound or distressed.[64]

<u>Second stage</u>: the Commission assesses the restructuring plan.</td><td colspan="2"><u>First stage</u>: The Commission assesses whether the aid is in line with the IAC-criteria.

If this is the case, the aid is temporarily approved, on the condition that the Member State submits a restructuring plan– irrespective of whether the bank is fundamentally sound or distressed.[65]

<u>Second stage</u>: the Commission assesses the restructuring plan.</td></tr>
</table>

64. Pursuant to point 14 of the First Prolongation Communication.
65. Pursuant to point 14 of the First Prolongation Communication.

<table>
<tr><th colspan="4">The situation after the adoption of the 2013 Banking Communication</th></tr>
<tr><td>A fundamentally sound bank benefits from an asset relief measure under a scheme.</td><td>A distressed bank benefits from an asset relief measure under a scheme.</td><td>A fundamentally sound bank benefits from an ad hoc asset relief measure.</td><td>A distressed bank benefits from an ad hoc asset relief measure.</td></tr>
<tr><td colspan="2">NB: a scheme is only possible for small banks (i.e. banks with a balance sheet of not more than EUR 100 million).[66]

Every six months, the Member State must submit a report on the use of the scheme.</td><td colspan="2"><u>First stage</u>: impaired asset measures are no longer approved on a temporary basis, so there is no first stage.

The Member State should submit a capital raising plan[67] and a restructuring plan.[68] The measure is authorised only after the Commission has approved the restructuring plan.[69]

<u>Second stage</u>: the Commission assesses whether the measure is in line with the IAC-criteria and whether the restructuring plan meets the three restructuring objectives.

NB: the impaired asset measure can exceptionally be approved on a temporary basis as rescue aid.[70] This assessment corresponds to the <u>first stage</u>.

The Member State has to submit a restructuring plan within 2 months. In the <u>econd stage</u>, the Commission assesses the restructuring plan.</td></tr>
</table>

66. Pursuant to points 54-55 of the 2013 Banking Communication.
67. Pursuant to point 29 of the 2013 Banking Communication.
68. Pursuant to point 30 of the 2013 Banking Communication.
69. See point 34 of the 2013 Banking Communication.
70. Pursuant to points 50-53 of the 2013 Banking Communication.

Guarantee (scheme)

The situation after the adoption of the 2008 Banking Communication	
Bank ***does not call*** upon the guarantee	Bank ***calls*** upon the guarantee
First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. There is **no need to submit** a viability plan or restructuring plan for the beneficiary bank. Second stage: *there is no second stage.*	First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. Within 6 months, the Member State has to submit a **restructuring plan** for the beneficiary bank.[71] Second stage: The Commission assesses the restructuring plan.

71. Pursuant to point 30 of the 2008 Banking Communication.

The situation after the DG Competition Staff Working Document of 30 April 2010			
Bank ***does not call*** upon the guarantee		Bank ***calls*** upon the guarantee	
The total amount outstanding guaranteed liabilities exceeds both a ratio of 5% of total liabilities and the total amount of EUR 500 million.	These thresholds are not exceeded.		
First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. The member State has to submit a **viability plan** for the bank within 3 months from the granting of the guarantee. Second stage: the Commission assesses the viability plan.	First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. There is **no need to submit** a viability plan or restructuring plan for the beneficiary bank. Second stage: *there is no second stage.*	First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. Within 6 months, the Member State has to submit a **restructuring plan** for the beneficiary bank. Second stage: the Commission assesses the restructuring plan.	

The situation after the adoption of the 2013 Banking Communication			
Bank ***does not call*** upon the guarantee		Bank ***calls*** upon the guarantee	
The total amount outstanding guaranteed liabilities exceeds both a ratio of 5% of total liabilities and the total amount of EUR 500 million.	These thresholds are not exceeded.		
First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. Within 2 months from the granting of the guarantee, the member State has to submit a **restructuring plan** for the bank.[72] Second stage: the Commission assesses the restructuring plan.	First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. There is **no need to submit** a viability plan or restructuring plan for the beneficiary bank. Second stage: *there is no second stage.*	First stage: The Commission assessed (when the Member State notified the scheme to the Commission) whether the guarantee scheme was appropriate, necessary and proportionate. The Member State has to submit a **restructuring plan** within 2 months after the guarantee has been activated.[73] Second stage: The Commission assesses the restructuring plan.	

72. Pursuant to point 59-d of the 2013 Banking Communication.
73. Pursuant to point 59-e of the 2013 Banking Communication.

Annex V: behavioural commitments under bank support schemes

The following tables give an overview of the behavioural restrictions under bank support schemes. The first table concerns *recapitalisation schemes*, the second table concerns *guarantee schemes*, while the third table concerns *other schemes*.

The recitals mentioned in the tables refer to the recitals of the decisions in which the original schemes[74] were approved by the Commission. The symbol "-" indicates that the behavioural restriction was not mentioned in the decision.

	Balance sheet growth limitation	**Ban on advertising**	**Remuneration restrictions**	**Coupon/ dividend ban**	**Acquisition ban**
Austrian recapitalisation scheme (N557/2008, 9 December 2008)	-	Para. 40	-	Para. 98, 103	-
Danish recapitalisation scheme (N31a/2009, 3 February 2009)	-	-	Para. 27	Para. 27	-
Finnish recapitalisation scheme (N329/2009, 11 September 2009)	-	Para. 43	Para. 13	-	-
French recapitalisation scheme (N613/2008, 8 December 2008)	-	Para. 57	Para. 48	*[75]	-
German recapitalisation scheme (N625/2008, 12 December 2008)	-	Para. 19	Para. 18	-	-
Greek recapitalisation scheme (N560/2008, 19 November 2008)	Para. 19	Para. 19	Para. 19	Para. 19	-
Hungarian recapitalisation scheme (N664/2008, 12 February 2009)	-	Para. 27	Para. 27	-	-
Polish recapitalisation scheme (N302/2009, 21 December 2009)	-	Para. 20	Para. 23, 56	Para. 21-22	*[76]

74. Amendments to the schemes are thus not taken into account in the following tables.
75. The participating banks were prohibited from repurchasing their own shares. See para. 58 of the decision.
76. Interestingly, the decision on the sixth prolongation of the scheme mentions an acquisition ban. See: Prolongation of the Polish bank recapitalisation scheme, SA.35943, 11 February 2013, para. 22.

	Balance sheet growth limitation	**Ban on advertising**	**Remunera-tion restrictions**	**Coupon/ dividend ban**	**Acquisition ban**
Portuguese recapitalisation scheme (N556/2008, 20 May 2009)	-	-	Para. 40	Para. 40	-
Portuguese new recapitalisation scheme (SA.34055, 30 May 2012)	-	Para. 23, 39	-	Para. 23, 39	Para. 23, 39
Spanish recapitalisation scheme (FROB) (N28/2010, 28 January 2010)	-	Para. 25	Para. 25 *[77]	Para. 25	Para. 25
Spanish new recapitalisation scheme (SA.35069, 25 July 2012)	-	Para. 35	-	Para. 35	Para. 35
Swedish recapitalisation scheme (N69/2009, 10 February 2009)	-	Para. 16	Para. 16	-	-
UK recapitalisation scheme (N507/2008, 13 October 2008)	Para. 12	-	Para. 12	-	-

77. The participating banks committed to “accommodate the remuneration of senior management to the applicable Union rules and to the criteria laid down in the Commission Recommendation of 30 April 2009, on the remuneration policies in the financial services sector”.

	Balance sheet growth limitation	Ban on advertising	Remunera-tion restrictions	Coupon/ dividend ban	Acquisi-tion ban
Cypriot guarantee scheme (SA.35499, 6 November 2012)	Para. 42	Para. 42	Para. 42	*[78]	-
Danish guarantee scheme (NN51/2008, 10 October 2008)	Para. 26	Para. 14	-	Para. 53	-
Finnish guarantee scheme (N567/2008, 13 November 2008)	Para. 14	Para. 16	Para. 16	*[79]	-
German guarantee scheme (N625/2008, 12 December 2008)	-	Para. 27	-	-	-
Greek guarantee scheme (N560/2008, 19 November 2008)	Para. 19, 29	Para. 19, 29	-	-	-
Hungarian guarantee scheme (N664/2008, 12 February 2009)	-	Para. 24, 27	Para. 27	-	-
Irish guarantee scheme (CIFS) (NN48/2008, 13 October 2008)	-	-	Para. 27	-	-
Irish guarantee scheme (ELG) (N349/2009, 20 November 2009)	-	-	-	-	-
Italian guarantee scheme (N520a/2008, 13 November 2008)	Para. 14	Para. 13	-	-	-
Latvian guarantee scheme (N638/2008, 22 December 2008)	-	Para. 18	Para. 18	Para. 18	-
Dutch guarantee scheme (N524/2008, 30 October 2008)	Para. 14, 41	Para. 13, 43	Para. 12, 44	-	-

78. The participating banks were prohibited from repurchasing their own shares. See para. 42 of the decision.
79. The participating banks were prohibited from repurchasing their own shares. See para. 16 of the decision.

	Balance sheet growth limitation	Ban on advertising	Remunera-tion restrictions	Coupon/ dividend ban	Acquisi-tion ban
Polish guarantee scheme (N208/2009, 25 September 2009)	-	Para. 19, 23, 48	Para. 19, 23	Para. 19, 23	
Portuguese guarantee scheme (NN60/2008, 17 December 2008)	Para. 18	-	-	-	-
Slovenian guarantee scheme (N531/2008, 12 December 2008)	-	Para. 14	Para. 14	-	Para. 14
Spanish guarantee scheme NN54b/2008, 23 December 2008)	-	Para. 43	-	-	-
Swedish guarantee scheme (N533/2008, 29 October 2008)	Para. 14	Para. 17	Para. 17	-	-
UK guarantee scheme (N507/2008, 13 October 2008)	Para. 12, 21	-	-	-	-

	Balance sheet growth limitation	Ban on advertising	Remunera-tion restrictions	Coupon/ dividend ban	Acquisi-tion ban
Bulgarian liquidity scheme (SA.38994, 29 June 2014)	-	Para. 29	-	-	-
Cypriot bond loan scheme (N511/2009, 22 October 2009)	Para. 20	Para. 20	-	-	-
French refinancing scheme (N548/2008, 30 October 2008)	Para. 31	Para. 30	Para. 27	-	-
Hungarian liquidity scheme (NN68/2009, 14 January 2010)	-	Para. 19	-	-	Para. 19
Slovak support scheme (N392/2009, 8 December 2009)	-	Para. 30	Para. 30	Para. 30	-
Slovenian liquidity scheme (N637/2008, 20 March 2009)	-	-	Para. 20	Para. 20	Para. 19

Annex VI: List of banks benefiting from asset relief measures

Member State	Bank	Impaired asset measure
Austria	BAWAG	Asset guarantee
(Austria)	*(KA)*	*Split-up* *NB: no impaired asset measure*
(Austria)	*(OVAG)*	*Asset guarantee was comparable to recapitalisation* *NB: no impaired asset measure*
(Austria)	*(HGAA)*	*Asset guarantee was comparable to recapitalisation NB: no impaired asset measure*
Belgium	KBC	State Protection Measure
Belgium	Dexia (2010)	FSA measure
Belgium	Fortis	Royal Park Investments (RPI)
Denmark	FIH	
Germany	Hypo Real Estate	Transfer of assets to FMS WertManagement
Germany	LBBW	Asset relief (ABS portfolio and Sealink portfolio)
Germany	HSH Nordbank	Risk shield
Germany	BayernLB	Risk shield
Germany	NordLB	Contingent asset relief measure
Germany	WestLB	Risk shield
Germany	WestLB (2009, 2011)	Spin-off of assets (bad bank)
Hungary	MKB	Asset separation tool: transfer of assets to the RAMV
Ireland	scheme	NAMA
Ireland	Quinn Insurance	Split-up
Ireland	Anglo/INBS	Only in the context of NAMA
Latvia	Parex banka	Split-up
Lithuania	scheme	
Netherlands	ING	IABF
Netherlands	ABN AMRO	Measure A (NB: guaranteed portfolio was not made of impaired assets. IAC applied by analogy)
Netherlands	SNS REAAL (2013)	Bad bank measure (i.e. Property Finance)
Portugal	BPN	Transfer of assets to the SPV's
Portugal	Banif	Asset separation tool: transfer of assets to the AMC

Member State	Bank	Impaired asset measure
Slovenia	Abanka	Transfer of impaired assets to the BAMC
Slovenia	NKBM	
Spain	CajaSur	APS
Spain	CCM	
Spain	NCG	Transfer of impaired assets to the AMC
Spain	Banco CEISS	Transfer of impaired assets to the AMC
Spain	Liberbank	Transfer of impaired assets to the AMC
Spain	Banco Mare Nostrum	Transfer of impaired assets to the AMC
Spain	Banco Grupo Cajatres	Transfer of impaired assets to the AMC
Spain	Banco de Valencia	1) Transfer of impaired assets to the AMC 2) APS
Spain	Banco CAM	APS
Spain	BFA	Transfer of impaired assets to the AMC
Spain	UNNIM	APS
United Kingdom	Royal Bank of Scotland	Participation in the APS
United Kingdom	Dunfermline	Split-up
United Kingdom	Northern Rock	Split-up

Annex VII: Viability-measures

The following table gives an overview of the characteristics that are relevant to the viability-assessment. This table lists six relevant characteristics (discussed in sections 11.2 to 11.7) and 90 bank State aid cases. For each bank State aid case, it is indicated whether the Commission took into account that the case was characterised by the relevant characteristic.

In the table, the following symbols are used:

- The number indicates in which recital of the Restructuring Decision[80] the relevant characteristic is mentioned.
- The letters indicate whether the relevant characteristic was mentioned in the **d**escription-part ("D") or in the assessment-part of the decision. A further distinction is made between the assessment of the **v**iability ("v-A"), **b**urden-sharing ("b-A") and **c**ompetition distortions ("c-A").
- The dash ("-") means that the relevant characteristic is not mentioned in the decision.
- The asterisk ("*") means that the relevant characteristic is not mentioned in the Restructuring Decision, although there are indications that the case was characterised by the relevant characteristic.
- When the decision explicitly mentions that the case is not characterised by a relevant characteristic (for instance the decision mentions that the bank did not have funding problems), this is indicated *in italics*.
- Since remuneration restrictions are sometimes mentioned in the context of the corporate governance framework and sometimes in the context of cost-cutting (see section 11.4.3.1), the table indicates whether this is the case.

80. More information on the Restructuring Decisions can be found in the table in annex III. In that table, the Restructuring Decisions are highlighted (in **bold**).

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
OVAG *C*	-	Annex 8.6	71 D, annex 8.6 (corp. gov.)	-	46-48 D, 103 v-A	60 D, 112 b-A
BAWAG *C*	24 D	-	-	-	*87 v-A (no funding problem)*	-
Hypo Tirol *C*	-	36 D, 59 v-A, annex 17	-	59	-	-
HGAA *S/C/W*	-	-	-	60 D, 148 c-A	66 D, 113 v-A, 116 v-A, 119 v-A	-
KA (2011) *S/C/W*	89 b-A	-	-	-	67 v-A	*81 v-A*
KA (2013) *W*	-	-	-	-	-	-
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
KBC *C*	-	-	69 D, annex point vii (corp. gov.)	-	*49 D, 147 v-A (no funding problem)*	-
Ethias *C*	-	119 v-A	120 v-A (corp. gov.)	44 D, annex 1.2	-	49 D, 131 b-A
Fortis (2008) *S/C/T/C*	80 v-A 95 c-A	-	*96 c-A (no restriction needed)*	-	84	-
Dexia (2010) *C*	-	-	219 c-A, annex point 10	-	175	74 D
Dexia (2012) *S/C/T/W*	-	276, 284, 345	291 118, 621, 683	285	558	550 v-A

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
FIB *C*	-	50 D, 98-102 v-A	-	36 D, 49 D, 94-97 v-A	39 D	45-46 D, 90 v-A, 121 b-A
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
CCB (2014) *C*	119 v-A	50-55 D, 118 v-A	147 b-A (cost-cutting), annex point 30 ("operational efficiency")	122 v-A	-	129-131 v-A
CCB (2015) *C*	-	86 v-A	108 b-A (cost-cutting)	86 v-A	-	108 b-A
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
Amager-banken *S/T/W*	58 D	-	-	-	-	-
Eik Banki *S/T/W*	-	-	-	-	-	-
Fionia Bank *S/T/W*	-	-	-	-	-	-
Roskilde Bank *S/T/W*	-	-	-	-	-	-
FIH Holding *C*	-	Annex 5.7	-	-	137 c-A	-
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
CIF *W*	-	-	Annex point 2-d	-	-	-

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
Bayern-LB *C*	-	190-193 v-A, annex point 21	211 c-A (behavioural restraint), annex points 23-24	-	176 v-A	175 v-A
Com-merz-bank *C*	-	101 v-A	37 D, 101 v-A (corp. gov.)	63 D 100 v-A	*60 D (no funding problem)*	37 D
HRE *C*	63 D	85 A	-	86 A, 97 v-A	62 D, 66 D, 91 v-A	108 v-A
HSH Nord-bank *C*	-	180 A, annex point 11	Annex 12.1 (corp. gov.)	226 v-A	66 D, 70 D	56 D
IKB *C*	113 c-A	-	-	98 v-A	50 D	99 v-A
LBBW *C*	-	27-29 D, 84-87 v-A	*[81]	76, 90 v-A	*37 D, 72 v-A (no funding problem)*	81 v-A
NordLB *C*	-	-	Annex point 14	-	*141 v-A (no funding problem)*	151 b-A
Sachsen LB *T*	126 c-A	-	-	Footnote 15	-	-
Spar-kasse Koln-Bonn *C*	-	37-41 D, 80 v-A	-	-	-	88 b-A
WestLB (2009) *C*	-	68-69 v-A *[82]	-	75 v-A	-	32 D, 75 v-A, 86 c-A
WestLB (2011) *W*	-	-	-	-	-	65 D, 84 D

81. NB: remuneration restrictions are mentioned in para. 37 of the Opening Decision (of 30 June 2009).
82. Ownership structure.

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
Alpha Bank *C*	-	121 D, 276 v-A, annex chapter III	121 D, 292 b-A, annex chapter II point 12	Annex chapter III	271-273 v-A	292 b-A
Euro-bank *C*	-	130 D, 373 v-A, annex chapter III	130 D, 391 v-A, 402 b-A, annex chapter II point 13	Annex chapter III	368-370 v-A	390 b-A
Pireaus Bank *C*	-	141 D, 333 v-A, annex chapter III	141 D, annex chapter II point 13	Annex chapter III	328-330 v-A	346 b-A
National Bank of Greece *C*	-	156 D, 383 v-A, annex chapter III	156 D, 397 b-A, annex chapter II point 13	Annex chapter III	378-380 v-A	397 b-A
TT Hellenic Postbank *S/T/W*	-	*[83]	*[84]	*	*	*
Nea Proton Bank *S/T/W*	-	*[85]	*[86]	220	*	*
ATE (2011) *C*	-	42 D, annex 14	28 D (cost-cutting)	28 D	63 v-A	28 D, 42 D, 75 v-A
ATE (2013) *S/T/W*	-	-	-	-	-	35 D
Panelli-nia Bank *S/T/W*	-	-	-	-	-	*

83. It is indirectly mentioned, since TT Hellenic Postbank was integrated into Eurobank, which committed to improve its risk management, corporate governance, etc.
84. NB: remuneration restrictions were included in the Greek support scheme, N560/2008, para. 19a and 19b.
85. It is indirectly mentioned, since Nea Proton Bank was integrated into Eurobank, which committed to improve its risk management, corporate governance, etc.
86. NB: remuneration restrictions were included in the Greek support scheme, N560/2008, para. 19a and 19b.

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
FHB *C*	-	-	89 c-A	-	44 D, 73-75 v-A	-
MKB *C*	-	-	73 D, 121 b-A	64 D, 113 v-A	-	43 D, 63 D, 113 v-A
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
Anglo/ INBS *W*	*[87]	-	*[88]	-	-	-
AIB/EBS *C*	50 D	-	*[89]	-	108 v-A	50 D, 54 D, 67 D, 110 v-A
BOI (2010) *C*	-	86 D, 155 D	86 D ("risk management")	86 D	207	-
BOI (2011) *C*	-	61 D, 211	61 D	61 D	51 D, 130 v-A	60 D
IL&P (PTSB) *C*	-	-	21 D (cost-cutting)	-	70 v-A	21 D, 73 v-A
Quinn Insurance *S/T/W*	46 D	-	-	-	-	-

87. NB: Management changes and remuneration restrictions are mentioned in para. 66 of the decision of 26 June 2009 on Anglo Irish Bank.
88. NB: Management changes and remuneration restrictions are mentioned in para. 66 of the decision of 26 June 2009 on Anglo Irish Bank.
89. AIB/EBS, 2011, para. 83; AIB 2010, para. 96; Irish guarantee scheme, para. 27.

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
MPS *C*	-	72-73 D, 129-130 v-A	76 D ("behavioural safeguards")	62 D	127 v-A	50-52 D, 118-119 v-A, 143 b-A
BRC *S/T/W*	-	-	-	-	-	-
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
Parex banka *S/C/W*	136 v-A	38 D, 136 v-A	-	39 D, 136 v-A	41 D	42 D
MLB *S/T/W*	-	-	-	-	-	-
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
LCCU *C*	-	-	24 D, 58 b-A, 66 c-A	15 D, 22 D, 47 v-A	-	-
AB Ukio Bankas *S/T/W*	11 D	75 v-A	-	75 v-A	-	-
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
Kaup-thing Bank Luxem-bourg *S/T/W*	-	-	-	-	70 v-A	-

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
ABN AMRO *C*	-	-	-	-	305	83 D
ING *C*	-	-	59 D (corp. gov.), 90 D, 129 v-A (corp. gov.)	-	*75 D (no funding problem)*	51 D, 128 v-A
SNS REAAL (2010) *C*	-	48 D	48 D	47 D	*49 D (no funding problem)*	30 D
SNS REAAL (2013)	13 D, 84 v-A	-	51 D, 84	-	79 v-A	Annex I
Aegon *C*	-	-	-	-	-	54 D
Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
CGD *C*	-	Annex 6.5	Annex 6.6	-	-	28-29 D, 62 v-A
BPI *C*	-	-	Annex 5.4	-	76 v-A	38-40 D
BCP *C*	-	87 v-A	Annex 4.5	87 v-A	37	37 D
BPN *T*	200 v-A, 238 b-A	-	-	43, 77	208	201 v-A
BES *S/C/W*	-	Annex section II.1	Annex section II.2, 40 D, 93 A	Annex section II.1	-	-
Banif *S/T/W*	-	-	-	-	-	151 v-A

Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**	**Risk management**	**Funding strategy**	**Cost-cutting**
Abanka *C*	-	15, 32, 48, 109-113 v-A Annex 8	48 D (corp. gov.), 111 v-A (corp. gov.), 142 b-A (cost-cutting), annex 8-vii (corp. gov.)	32 D, 49, 114-119, annex 9	*107 v-A (no funding problem)*	132 v-A, 142 b-A
Abanka/ Banka Celje *C*	-	138-142 v-A	140 v-A (corp. gov.) 170 (cost-cutting)	143-148 v-A	-	160 v-A, 170 b-A
NKBM *C*	101 v-A	104-108 v-A, Annex 6	28 D (corp. gov.), 41 D (burden sharing), 106 v-A (corp. gov.), annex 6.9 (corp. gov.)	109-112 v-A	-	126 v-A,
NLB *C*	-	128-131 v-A	39 D (corp. gov.), 130 v-A (corp. gov.), annex 9.8	132-135 v-A	142 v-A	146 v-A, 157 b-A
Factor Banka *W*	-	-	-	-	-	-
Pro-banka *W*	-	-	-	-	-	-

Bank	Replacement of senior management	Corporate Governance	Remuneration restrictions	Risk management	Funding strategy	Cost-cutting
Catalunya Banc *C*	166 v-A	17, 166 v-A	Annex 7.3	166	171	166 v-A, 174 b-A
NCG Banco *C*	160 v-A	13, 160 v-A	Annex 7.4	160 v-A	167 v-A	160 v-A, 173 b-A
BFA *C*	190 v-A	18, 190 v-A	215(i) A Annex 7.4	-	196-198	190 v-A, 201 b-A
Banco Mare Nostrum *C*	-	14	Annex 7.4	-	50, 141	134 v-A, 149 b-A
Liberbank *C*	-	Only in the title of annex 8	Annex 8.4	122, 124	123 v-A	131 b-A
Banco de Valencia *T*	-	-	-	-	165 v-A	-
Banco CAM *T*	157 b-A	-	-	-	138 v-A	-
UNNIM Banc *T*	-	-	-	-	154 v-A	-
Cajatres *T*	-	136, Annex 8.3	Annex 8.3	136	*145 v-A (no funding problem)*	138 v-A, 154 b-A
Banco Galleco *T*	-	16	-	-	113 v-A	-
CajaSur *T*	82 b-A	92 A*[90]	-	-	-	-
CCM *T*	17 D	-	-	-	155 v-A	155 v-A
Banco CEISS *C*	-	13	Annex 8.4	142	147-148 v-A	142 v-A, 154 b-A

90. This was addressed in the section titled "8.1.1.3. Remuneration of the aid measures granted".

Bank	**Replacement of senior management**	**Corporate Governance**	**Remuneration restrictions**[91]	**Risk management**	**Funding strategy**	**Cost-cutting**
LBG *C*	75 D	39 D, 139 v-A	-	39 D, 139 v-A	147	68 D
RBS *C*	65 D, 189 v-A	-	64 D, 106 D, 208 v-A	191 v-A	188	57 D, 64 D, 191 v-A
B&B *S/T/W*	-	-	-	-	-	-
NR *S/C/W*	-	-	-	-	130 v-A	-
Dun-ferm-line *S/T/W*	-	-	-	-	-	98 v-A

91. See: UK support scheme, para. 12a.

Annex VIII: Burden-sharing by shareholders

The following table gives an overview of the burden-sharing by shareholders in the bank State aid cases. As discussed in chapter 12, there are various forms of burden-sharing by shareholders: nationalisation (see section 12.5.3.1), dilution (see section 12.5.3.2), capital raising (see section 12.5.3.3), remaining at the bad bank (see section 12.5.3.4), write-down (see section 12.5.3.5) and the dividend ban (see section 12.5.3.6).

<table>
<tr><th>Bank</th><th>Nationalisation</th><th>Dilution</th><th>Capital raising</th><th>Remaining at the bad bank</th><th>Write-down</th><th>Dividend ban</th></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>OVAG
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The capital increase is to be conducted in two steps. First, the bank's capital is reduced by 70% to offset the accumulated losses. That capital cut also reduces pro rata the PS which Austria injected in 2009. In a second step, ÖVAG receives fresh capital totalling EUR 484 million. EUR 250 million thereof is to be subscribed by Austria, the rest by the Volksbanken. Austria and the Volksbanken will subscribe the shares at the price of EUR 2.181 per share. As a result, the State will obtain a 43.4% stake in the bank and become the second-biggest shareholder after the Volksbanken (50.2%). The stakes of the other shareholders, which do not participate in the capital injection, will be diluted: DZ-Bank 3.8%, ERGO 1.5%, RZB 0.9%, free float 0.1%.”[92]</td></tr>
<tr><td>BAWAG
C</td><td></td><td></td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“In July 2009 the bank successfully placed EUR 80 million Tier 2 capital on the market, and in August 2009 the bank received EUR 205 million of capital through a shareholder contribution.”[93]</td></tr>
<tr><td>Hypo Tirol
C</td><td></td><td></td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“Die Hypo Tirol hat zugesagt, im Falle von Verlusten im operativen Geschäft keine Kuponzahlungen vorzunehmen. Auf diese Weise wird im Einklang mit Randnummer 26 der Umstrukturierungsmitteilung sichergestellt, dass die Bank keine staatlichen Beihilfen zur Zahlung einer Vergütung für Eigenmittel verwendet, wenn die entsprechenden Geschäfte keine ausreichenden Gewinne abwerfen.”[94]</td></tr>
</table>

92. OVAG, 19 September 2012, para. 23. See also: para. 49,50 and 119.
93. BAWAG, 30 June 2010, para. 97.
94. Hypo Tirol, 4 October 2012, para. 75.

HGAA *S/C/W*	**Nationalisation**					
"First, all previous shareholders of HGAA *have sold their shares* to the Republic of Austria *for a symbolic price of one euro* which reduced the risk that the aid measures benefit the former shareholders. The former owners have also provided HGAA with capital or liquidity, which have been used to cover losses and to improve the liquidity situation. The majority shareholder of HGAA at the time of that sale was BayernLB. In total, BayernLB has contributed about EUR 1.5 billion in capital whilst renouncing further ownership rights, not even any prospect of further remuneration. BayernLB also contributed about EUR 4.3 billion in liquidity to HGAA. Furthermore, BayernLB faced a significant write-down loss when selling its HGAA shares which contributes to addressing moral hazard in line with point 22 of the Restructuring Communication."[95]						
KA (2011) *S/C/W*	**Nationalisation**					**Dividend ban**
"As regards burden sharing related to the restructuring process, the Commission takes note of several positive elements. First, previous shareholders have been *almost entirely wiped out* by the nationalisation, and within the nationalisation were required to transform claims against KA *into hybrid capital* (participation certificates). Moreover, hybrid issuances (including the participation certificates from the previous owners) have been split between KA Neu and KA Finanz […], thus ensuring additional burden sharing, since the potential profits of KA Finanz will be skimmed off by the guarantee fees to be paid to the state."[96]						
KBC *C*						**Dividend ban**
This case is somewhat remarkable, because there is no clear indication of burden-sharing by shareholders (apart from the dividend ban).						
Ethias *C*		**Dilution**				**Dividend ban**
"The Commission observes that the historic owners of Ethias have contributed to the costs of restructuring. In particular, the historic owners, if considered as a whole, have lost control of the company, as their stake was *diluted* from 100% to 25%."[97]						
Fortis (2008) *S/C/T/C*						
Even though there was burden-sharing by shareholders (because Fortis was broken-up and most activities were sold), the decision does not really mention the aspect of burden-sharing by shareholders.						

95. HGAA, 3 September 2013, para. 124-125.
96. KA, 31 March 2011, para. 87. Only the Österreichischer Gemeindebund retained its share.
97. Ethias, 20 May 2010, para. 129.

Dexia (2010) *C*		**Dilution**				
"Dexia, its shareholders and the Member States concerned have already made an own contribution to the restructuring effort in particular through the *dilution* of the share of the capital stock held by existing shareholders when the bank's capital was increased (the French and Belgian authorities directly subscribed to EUR 3 billion of the EUR 6.4 billion capital increase announced in September 2008)."[98]						
Dexia (2012) *S/C/T/W*		**Dilution**				
"The EUR 5,5 billion dilution of existing shareholdings planned by the recapitalisation by the Belgian and French States will be considerable. Existing shareholders, other than the Belgian and French States, will see their holdings *drastically diluted* from 88,54% before the capital increase to 5,58% thereafter."[99]						
FIB *C*						
"When the State provides a capital injection, equity capital and subordinated debt holders must contribute to reducing the capital shortfall to the maximum extent. Such contributions can take the form of either a conversion into Common Equity Tier 1 or a write-down of the principal of the instruments. *In the absence of any capital need in the case of FIB the Commission will not require such measures*."[100]						
CCB (2014) *C*		**Dilution**				
"Without aid, the capital of the Cooperative group would have become negative in 2014. As a consequence of the State's capital injection in the CCB, the State will own 99% of the shares and voting rights of the CCB. Its existing shareholders, the CCIs, will be completely *diluted* and left with 1%."[101]						
CCB (2015) *C*		**Dilution**				
"The 1% shareholders of the CCB, the CCB Holding Company, and the 1% shareholders of the CCIs, the old members, who will exchange their shares in the CCIs for shares in the CCB, will hold a combined share with the range of 0.77%-0.98% in the CCB. They will therefore *be further diluted* by the new recapitalisation and represents only a negligible shareholding. Hence the requirements of the 2011 Prolongation Communication and of the 2013 Banking Communication are complied with."[102]						

98. Dexia, 26 February 2010, para. 200.
99. Dexia, 28 December 2012, para. 615.
100. FIB, 25 November 2014, para. 108.
101. CCB, 24 February 2014, para. 139.
102. CCB, 2015, para. 105.

Amager-banken *S/T/W*				**Remaining at the bad bank**		
"The features of the burden-sharing foreseen in the conditional transfer agreement ensure that losses on the book of Amagerbanken will be borne in full by Amagerbanken's owners and unguaranteed creditors. Accordingly, the subordinated debt holders and shareholders *have suffered 100% losses*. They could only benefit from proceeds of sale and windingdown of the New Bank in the context of the earn-out mechanism, and would only receive a positive contribution after full repayment of aid received (increased by an annual interest payment of 10%). Such a prospect for shareholders and unguaranteed creditors is thus very unlikely in view of the assessment of the value of the assets transferred to the New Bank."[103]						
Eik banki						
Fionia Bank *S/T/W*				**Remaining at the bad bank**		
"The Commission considers burden-sharing to be sufficient as the old shareholders *lost control of the bank and all financial stakes therein without any compensation* (except for the theoretical Earn- Out facility, which is deemed justified as being necessary and proportionate to ensure the quick and smooth implementation of the liquidation)."[104]						
Roskilde Bank *S/T/W*				**Remaining at the bad bank**		
"The investors having invested in old RB's equity and subordinated capital may only get some future compensation via a so-called earnout mechanism after the DNB and DPB are repaid at subscription value plus interest."[105]						
FIH Holding *C*						**Dividend ban**
"FIH has committed *not to pay any dividends* during the restructuring phase and to repay a previous State recapitalisation of DKK 1,9 billion. Further, FIH will not make any coupon payments to investors in hybrid instruments or any instrument for which financial institutions have discretion to pay coupons or to call, regardless of their regulatory classification, including subordinated debt instruments, if no legal obligation to make payments exists."[106]						
CIF *W*						
The limited burden-sharing in this case was justified.						

103. Amagerbanken, 25 January 2012, para. 125.
104. Fionia, 25 October 2010, para. 76.
105. Roskilde Bank, 5 November 2008, para. 62.
106. FIH, 11 March 2014, para. 133.

<table>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>BayernLB
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“Another aspect concerns the savings banks association, which did not participate in the 2008 rescue measures even though it was a shareholder in BayernLB. Because it did not participate in the rescue, the savings banks association's stake has been significantly diluted, but it has in the meantime agreed to various additional contributions. (…) As a result of all these measures the shareholding that was initially diluted to 6% will rise significantly, potentially up to 25%.”[107]</td></tr>
<tr><td>Commerz-bank
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The Commission is satisfied that, in addition to the earlier capital increase, the planned capital increase is necessary so that Commerzbank can meet both internal and external demands and that it has adequate risk buffers at its disposal for the near future.”[108]
“Furthermore, the owners are to participate in the costs of restructuring the bank as much as possible. The existing shareholders and holders of hybrid capital instruments have not taken part in the capital increases, with the exception of Allianz, whose contribution must be attributed mainly to its desire to complete the takeover of Dresdner Bank as quickly as possible. Nevertheless they shoulder part of the burden through the ban on dividend payments and on using reserves for coupon payments. The Commission is convinced that there is a limit to imposing a heavier burden on the holders of hybrid capital instruments at Commerzbank.”[109]</td></tr>
<tr><td>HRE
C</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“It should also be borne in mind that the bank was taken into public ownership and that the compensation received by its former shareholders was based on the value of the company without state support. That outcome is a positive element from a state aid point of view and means that the former shareholders have been wiped out and thus can be considered as having sufficiently contributed to the costs of the restructuring of HRE.”[110]</td></tr>
<tr><td>HSH Nordbank
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The Commission concludes that adequate own contribution and burden sharing of the minority shareholders can be achieved, and consequently that the aid can be viewed as compatible subject to the conditions described in recitals 262, 202 to 208 and 241 to 244.”[111]</td></tr>
</table>

107. BayernLB, 5 February 2013, para. 198-202.
108. Commerzbank, 7 May 2009, para. 105.
109. Commerzbank, 7 May 2009, para. 107. See also para. 4: “As a result of SoFFin’s planned participation in Commerzbank of 25% + 1 share, these shareholdings will be reduced.” NB: this points at dilution.
110. HRE, 18 July 2011, para. 121.
111. HSH Nordbank, 20 September 2011, para. 263.

<table>
<tr><td>IKB
C</td><td></td><td></td><td>Capital raising</td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“A significant part of the restructuring of the portfolios is borne by the company itself and the previous and new private shareholders, comprising in particular the participation of the banking associations, IKB’s own funds and Lone Star’s capital injection.”[112]</td></tr>
<tr><td>LBBW
C</td><td></td><td></td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“As the shareholders have injected capital into the bank pro rata to their respective shareholding, the burdens are at least equitably distributed among the groups of shareholders.”[113]</td></tr>
<tr><td>NordLB
C</td><td></td><td></td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“Another aspect concerns the Savings Banks' Association, the second group of shareholders of NORD/LB. The Commission noted that they have also contributed to the restructuring of the bank both in the conversion of capital as well as in the provision of new capital.”[114]</td></tr>
<tr><td>SachsenLB
T</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“In addition, the Commission recognises that the old owners of the bank and the management are not involved any more in the activities of Sachsen LB, which provides a valuable signal against moral hazard.”[115]</td></tr>
<tr><td>Sparkasse KolnBonn
C</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">No mention of burden-sharing by shareholders. This could be explained by the fact that there were no private shareholders; the ultimate owners of Sparkasse KolnBonn were the city of Koln (70%) and Bonn (30%).[116]</td></tr>
<tr><td>WestLB (2009)
C</td><td></td><td></td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">The owners of WestLB were required to sell their shares. However, this was not mentioned in the context of burden-sharing, but in the context of the restoration of long-term viability.</td></tr>
</table>

112. IKB, 21 October 2008, para. 104.
113. Para. 97. See also para. 10: “All shareholders participated in the capital injection in accordance with their respective levels of shares and indirectly in the impaired assets relief measure.”
114. NordLB, 25 July 2012, para. 156.
115. Para. 126.
116. Sparkasse KolnBonn, 4 November 2009, para. 6.

<table>
<tr><td>WestLB (2011)
W</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“In the cases of Northern Rock and HRE, burden sharing was achieved by nationalisation. As in those cases, the shareholders here will lose all their equity. Moreover, WestLB's shareholders, as well as SoFFin as the principal provider of hybrid capital, will take individual responsibility for the different parts into which WestLB is to be split and provide additional capital.”[117]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Alpha Bank
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The historical shareholders of the Bank were diluted by the rights issue completed in 2009 and then again by the HFSF recapitalisation (measure B4) and private capital raising of 2013 and March 2014. For instance, the stake held by the shareholders of the Bank, which at the time included the investors that injected money in 2009, was reduced from 100% prior to the Spring 2013 recapitalisation to only 4,9% after that recapitalisation. In addition, the Bank has not paid any dividend in cash since 2008. In addition to that burden-sharing by historical shareholders, the Bank has raised a significant amount of private capital since the crisis started in 2008, that is to say EUR 986 million in 2009, EUR 550 million in 2013 and EUR 1 200 million in 2014.”[118]</td></tr>
<tr><td>EFG Eurobank
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The existing shareholders of the Bank were heavily diluted by the Spring 2013 recapitalisation (measure B4). Indeed, the stake held by existing shareholders had been reduced from 100% prior to the Spring 2013 recapitalisation to only 1,44%. The Commission also notes that the Bank has paid no cash dividend since 2008. Finally the Commission takes a favourable view of the fact that the HFSF will inject additional capital only if the Bank fails to raise it from the market at a price deemed reasonable and established on the basis of two independent valuators.”[119]</td></tr>
<tr><td>Pireaus Bank
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The historical shareholders of the Bank were diluted by the rights issue completed in 2009115 and then again by the HFSF recapitalisation (measure B4) and private capital raising of 2013 and March 2014. For instance, the stake held by the shareholders of the Bank, which at the time included the investors that injected money in 2009, was reduced from 100% prior to the Spring 2013 recapitalisation to only 2,3% after that recapitalisation. In addition, the Bank has not paid any dividend in cash since 2008. In addition to that burden-sharing by historical shareholders, the Bank has raised a significant amount of private capital since the crisis started in 2008, that is to say EUR 807 million in 2009, EUR 1 444 million in 2013 and EUR 1 750 million in 2014.”[120]</td></tr>
</table>

117. WestLB, 20 December 2011, para. 186.
118. Alpha Bank, 9 July 2014, para. 293.
119. Eurobank, 29 April 2014, para. 392.
120. Piraeus Bank, 23 July 2014, para. 347.

<table>
<tr><td>National Bank of Greece
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“The existing shareholders of the Bank were successively diluted by the rights issues completed in 2009 and 2010 and then by the HFSF recapitalisation. The stake held by the shareholders of the Bank was reduced from 100% prior to the Spring 2013 recapitalisation to only 5,1% afterwards. In addition, no dividend has been paid to ordinary shareholders since 2007 or to US preference shareholders since 2009. Besides that burden-sharing by historical shareholders, the Bank has raised a significant amount of capital since the crisis started in late 2008. That capital raised has contributed to reducing the amount of capital needs which had to be filled by State aid.”[121]</td></tr>
<tr><td>T Bank
S/T/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td></td><td></td></tr>
<tr><td colspan="7">“The shareholders and subordinated debt holders are not transferred and remain in the entity in liquidation. They will be entitled to proceeds from the liquidation only if the proceeds are sufficient to repay first the Resolution Scheme, which has a priority claim over the other creditors. Knowing that there are no more assets in T Bank, it is very likely that the shareholders and subordinated debt holders will not get back their investments.”[122]</td></tr>
<tr><td>TT Hellenic Postbank
S/T/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td></td><td></td></tr>
<tr><td colspan="7">“Concerning burden-sharing of shareholders and subordinated debt holders, the Commission has already established, in recital 100 of the New TT Opening Decision, that the shareholders and subordinated debt holders were not transferred to New TT Bank but have remained in TT Bank, that is to say, the entity in liquidation. Hence, the Commission considered that sufficient burden-sharing of shareholders and subordinated debt holders was achieved.”[123]</td></tr>
<tr><td>(Nea) Proton Bank
S/T/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td></td><td></td></tr>
<tr><td colspan="7">“Concerning burden-sharing of shareholders and subordinated debt holders, the Commission notes that the shareholders and subordinated debt holders were not transferred to Nea Proton Bank but have remained in the entity in liquidation. Therefore, there is a high probability that they will lose their investments. That burden-sharing reduces the aid amount needed. Hence, the Commission considers that sufficient burden-sharing of shareholders and subordinated debt holders is achieved.”[124]</td></tr>
</table>

121. NBG, 23 July 2014, para. 398.
122. T Bank, 16 May 2012, para. 51.
123. Eurobank, 29 April 2014, para. 257.
124. Nea Proton Bank, 26 July 2012, para. 77.

ATE (2011) *C*		**Dilution**				
"The current shareholders will be *diluted* in the context of the upcoming capital increase of EUR 1,259.5 million, as the State will possibly participate for a higher proportion than its current shareholdership in ATE."[125]						
ATE (2013) *S/T/W*				**Remaining at the bad bank**		
"The Commission also takes positive note of the fact that the shareholders of ATE Bank were *completely wiped out*. Moreover, the Greek authorities did not transfer shares or subordinated debt to Piraeus Bank."[126]						
Panellinia Bank *S/T/W*				**Remaining at the bad bank**		
"The equity of the Bank, which consists only of ordinary shares and of preference shares owned by the Hellenic Republic, *will not be transferred, but will be left in the liquidated entity*. Therefore, the shareholders are fully wiped out and suffer 100% losses."[127]						
FHB *C*						**Dividend ban**
"The Hungarian authorities also note that FHB *has not paid dividends* for several years in succession, and it has only purchased back a minor portion of its shares relative to the total value of the shareholder's equity. Accordingly, as the amount of funds returned to owners and shareholders has been low over the past years, an appropriate burden-sharing has been ensured."[128]						
MKB *C*					**Write-down**	**Dividend ban**
"The sole shareholder of MKB Bank, the Hungarian State, will be *fully written down*, and the resolution fund via the RAMV will become the sole shareholder of the core bank."[129]						

125. ATE, 23 May 2011, para. 81.
126. ATE, 3 May 2013, para. 74.
127. Panellinia Bank, 16 April 2015, para. 113.
128. FHB, 22 February 2012, para. 61.
129. MKB, 16 December 2015, para. 117.

<table>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Anglo/ INBS
W</td><td>Nationalisation</td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“In the particular case of Anglo, private shareholders have been fully 'wiped out' and the bank was fully nationalised.
Concerning INBS, prior to the State recapitalisation INBS was owned by its members. In particular "share members" (persons who have a deposit account in INBS) had a right to gains on any surplus of assets realised in case of its demutualisation (transformation of INBS into an ordinary bank), winding-down or dissolution. As a result of the first recapitalisation of INBS, the State has taken full control of INBS via the issuance of Special Investment Shares, following which the members have lost all rights to gains on surpluses of the assets realised to the benefit of the State (for instance, in case of a sale of INBS). As a result, the economic rights of the share members have been completely 'wiped out'.”[130]</td></tr>
<tr><td>AIB/EBS
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“Quasi full burden sharing has been achieved from the former owners of AIB. Shareholders have been wiped out and the State currently owns 99,8% of the Bank.”[131]</td></tr>
<tr><td>BOI (2010)
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“As regards the existing shareholders, they have been significantly diluted by the participation of the State and private investors in the capital raising exercise described in paragraphs (81)-(85) and the following. In that way, they bore the consequence of the losses registered by BOI.”[132]

“By the end of the capital-raising exercise, the stake of incumbent shareholdings in BOI will be around 30% (compared with 100% just after the EUR 3.5 billion rescue recapitalisation in March 2009 and 84% following the payment of coupons on the government's preference shares in February 2010).”[133]</td></tr>
<tr><td>BOI (2011)
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“The Commission further notes that the need for additional State aid has been limited to a significant extent by the liability management exercises carried out in July and December 2011, while new capital has been raised on the market. Incumbent shareholders had to provide fresh capital to finance the restructuring costs, or significantly diluted in the capital raise.”[134]</td></tr>
</table>

130. Anglo/INBS, 29 June 2011, para. 165-166.
131. AIB/EBS, 2014, para. 121.
132. Bank of Ireland, 15 July 2010, para. 216.
133. Bank of Ireland, 15 July 2010, para. 82.
134. Bank of Ireland, 20 December 2011, para. 160.

<table>
<tr><td>IL&P (PTSB)
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“Almost complete burden-sharing has been achieved from the former owners of PTSB. Shareholders have been diluted and the State currently owns 99.2% of PTSB. Therefore, the amount of burden-sharing from the former owners is significant and adequate.”[135]</td></tr>
<tr><td>Quinn Insurance
S/T/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td></td><td></td></tr>
<tr><td colspan="7">“The former shareholders of QIL will in any case not benefit from the measures taken by Ireland to aid the administration of QIL. They are part of the rump of QIL that will be wound-down. They rank last or second-last and will only be paid out after all the other creditors have been compensated. The Commission notes that legally the rump of QIL is still owned by its shareholder, the Quinn Group (which is itself under share receivership). However, the Quinn Group will receive money only if the ICF is repaid in full. Given that the expected gap in the rump of QIL is estimated at EUR 738 million, there is no prospect of future economic value in that ownership of the rump.”[136]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>MPS
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">MPS was recapitalised in the form of ‘new instruments’. The restructuring plan of MPS included an accelerated repayment schedule with respect to the ‘new instruments’. To that end, MPS intended to increase its capital by at least EUR 2,5 billion.[137] This capital increase would significantly dilute the existing shareholders. If the capital increase would not be successful, then the ‘new instruments’ would be converted into normal shares. This conversion would also result in the dilution of existing shareholders.</td></tr>
<tr><td>BRC
S/T/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td>Write-down</td><td></td></tr>
<tr><td colspan="7">“Because BRC has currently negative equity, its shareholders will be fully written down. Furthermore, subordinated debt is not transferred to ICCREA but remains in the entity in liquidation.”[138]</td></tr>
<tr><td>Banca Tercas</td><td></td><td></td><td></td><td></td><td>Write-down</td><td></td></tr>
<tr><td colspan="7">“The Commission observes that a complete write-down of shareholders' equity was performed in Tercas.”[139]

“On 27 July 2014, the Tercas’ shareholders’ meeting decided: 1) to partially cover the losses inter alia by reducing capital to zero with cancellation of all the circulating ordinary shares; and 2) to increase the capital up to EUR 230 million with issuance of new ordinary shares offered exclusively to BPB.”[140]</td></tr>
</table>

135. IL&P, 9 April 2015, para. 85.
136. Quinn Insurance, 12 October 2011, para. 144.
137. MPS, 27 November 2013, para. 57.
138. BRC, 2 July 2015, para. 71.
139. Banca Tercas, 23 December 2015, para. 200.
140. Banca Tercas, 27 February 2015, para. 21.

Parex banka *S/C/W*	**Nationalisation**	**Dilution**				
"As a result of nationalization, the former majority shareholders in Parex banka were *wiped out* (see recital (13)). Due to the subsequent recapitalisation of Parex banka by the State and the EBRD, the minority shareholders were *diluted* (from previous 15.2% to 3.7% as at 7 July 2010)."[141]						
MLB						
"It has already been concluded in the opening decision that the base case scenario contained in the sales strategy ensures the limitation of the aid needed for the phasing-out of the commercial activities of MLB to the minimum. The actual execution of that plan does not change that assessment."[142] "The bank and its capital holders should contribute to the restructuring as much as possible with their own resources. That requirement ensures that rescued banks bear adequate responsibility for the consequences of their past behaviour and creates appropriate incentives for their future behaviour. In the present case the Commission notes that all the capital of the bank was held by the State. By means of a sale, the State discontinues the commercial activities of MLB."[143]						
LCCU *C*			**Capital raising**			**Dividend ban**
"In that regard, the Commission observes that the member credit unions provided capital covering 68% of the capital needs of the LCCU which was the maximum amount they could contribute in 2011 without jeopardizing their own existence."[144]						
AB Ukio Bankas *S/T/W*				**Remaining at the bad bank**		
"Although the shareholders of Ukio bank do not cease to be its owners they will participate in the restructuring costs. First, they contributed to the costs of the restructuring by absorbing the bank's losses. Second, in view of the capital gap it is not expected that either the shareholders or subordinated loans holders will receive any compensation as a result of the bankruptcy proceedings."[145]						

141. Parex banka, 15 September 2010, para. 53.
142. MLB, 17 July 2013, para. 91.
143. MLB, 26 January 2012, para. 211-212.
144. LCCU, 26 September 2012, para. 53
145. AB Ukio Bankas, 14 August 2013, para. 82.

<table>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Kaupthing Bank Luxem-bourg
S/T/W</td><td></td><td></td><td></td><td></td><td>Write-down</td><td></td></tr>
<tr><td colspan="7">“First of all, it should be noted that the restructuring plan provides that the Bank’s shareholder (that is to say the Icelandic parent company) must reduce its capital in the Bank to zero, with the result that it ceases to be a shareholder without receiving any compensation. To that degree, the Bank’s shareholder will have participated in the costs by absorbing the losses to the maximum extent of its capital. […].”[146]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>ABN AMRO
C</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">Burden-sharing by shareholders not applicable in this case, since the Dutch State acquired Fortis Bank Nederland (and thus ABN AMRO).</td></tr>
<tr><td>ING
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“Furthermore, the restructuring plan foresees that ING will raise EUR 5 billion of capital via a share offering in 2009, which will result in a dilution of existing shareholder rights. This can be considered as a significant own contribution of existing capital providers.”[147]</td></tr>
<tr><td>SNS REAAL (2010)
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“The shareholders of SNS have been diluted by the EUR 135 million capital increase in September 2009 (equivalent to 10% of shares). This capital increase was used to partly repay the State and the Foundation. The Foundation is entitled to be repaid pro rata with the State but it decided to waive this right and to be repaid a smaller amount in 2009 (with the remainder to be repaid in the coming years). It also accepted to be repaid at 100% (and not at 120%). The Commission considers that the dilution of shareholders and the waiving of payments by the Foundation, as the main strategic shareholder, provides for appropriate burden-sharing.”[148]</td></tr>
</table>

146. Kaupthing Bank Luxembourg, 9 July 2009, para. 72.
147. ING, 18 November 2009, para. 136.
148. SNS REAAL, 28 January 2010, para. 77.

<table>
<tr><td>SNS REAAL (2013)
C</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“As regards the increased burden-sharing requirements under the 2013 Banking Communication, the Commission notes that the Dutch State has not bailed out the shareholders of SNS REAAL and the hybrid debt-holders of SNS REAAL and SNS Bank. As described in recital (13), those shareholders and hybrid debt-holders were <u>expropriated</u> and will only receive a fair compensation in line with the relevant provisions of Dutch law.”[149]</td></tr>
<tr><td>Aegon
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“Burden-sharing is ensured by the contribution of capital and hybrid instrument holders of AEGON to the costs of the restructuring. In this respect it is noted first that the capital increase of August 2009, which was used to repay one-third of the State capital, provided burden-sharing through the <u>dilution</u> of existing shareholders. Second, the commitment by the Netherlands whereby AEGON will not make dividend payments to its common stock holders and will not call or repurchase any of the outstanding hybrid securities prior to the full repayment of the CCS ensures that the owners and hybrid instrument holders of AEGON contribute to the restructuring.”[150]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>CGD
C</td><td></td><td></td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“Ban on dividend, coupon and interest payments: CGD will not (and shall procure that none of its subsidiary undertakings shall) make any payments of dividends, coupons or interest to holders of preference shares and subordinated debt, in so far as those payments are not owed on the basis of contractual or legal obligations.”[151]

NB: this case was characterised by a breach of the dividend ban.</td></tr>
<tr><td>BPI
C</td><td></td><td></td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">NB: this case was characterised by a breach of the dividend ban.</td></tr>
<tr><td>BCP
C</td><td></td><td>Dilution</td><td>Capital raising</td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">In the decision on BCP, the Commission noted positively that 14% of the capital shortfall was provided by private investors.[152] In 2012, BCP not only issued CoCos subscribed by the Portuguese State, BCP also issued ordinary shares. These shares were offered to the current shareholders of BCP for subscription through the exercise of their pre-emptive subscription rights.[153] The issuance of ordinary shares diminished the State's recapitalisation to 86% of the identified total capital shortfall.</td></tr>
</table>

149. SNS REAAL, 19 December 2013, para. 92.
150. Aegon, 17 August 2010, para. 110.
151. CGD, 24 July 2013, annex point 6.7.
152. BCP, 30 August 2013, para. 110.
153. BCP, 30 August 2013, para. 25.

<table>
<tr><td>BPN
T</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“In November 2008 Portugal nationalised BPN by force of law at a zero price.”[154]
“In the present case, the Commission welcomes the fact that the shareholders have lost all their stake in the bank without any compensation.”[155]</td></tr>
<tr><td>BES
S/C/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td></td><td></td></tr>
<tr><td colspan="7">“All shareholders and subordinated creditors will be left in the Bad Bank.”[156]</td></tr>
<tr><td>Banif
S/T/W</td><td></td><td></td><td></td><td></td><td>Write-down</td><td></td></tr>
<tr><td colspan="7">“As resolution measure, Portugal will apply the Sale of Business resolution tool combined with the Bail-in tool which under the Portuguese implementation law of Directive 2014/59/EU is already applicable in 2015.”[157]

“Using its resolution powers, the resolution authority has generated EUR 431 million of capital through applying bail-in to holders of subordinated debt as well as liabilities from other credit institutions. This has to be added to the amount of shareholder capital still present in Banif of EUR 650 million bringing the total up to EUR 1 081 million.”[158]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Abanka
C</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“To ensure adequate burden-sharing and participation of Abanka’s existing investors in the restructuring, the equity holders and all subordinated debt holders were written down in full prior to the first recapitalisation.”[159]</td></tr>
<tr><td>NKBM
C</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“In that respect, Slovenia committed that before any State aid is granted to NKBM (i.e. the second recapitalisation and the transfer of impaired assets to the BAMC), the latter will write-down in full its shareholders’ equity and outstanding subordinated debts so ensuring compliance with the requirements of 2013 Banking Communication.”[160]</td></tr>
<tr><td>NLB
C</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“In that respect, Slovenia committed that before any State aid is granted to NLB (i.e. the third recapitalisation and the transfer of impaired assets to the BAMC), the latter will write-down in full its shareholders’ equity and outstanding subordinated debts so ensuring compliance with the requirements of 2013 Banking Communication.”[161]</td></tr>
</table>

154. BPN, 27 March 2012, para. 18.
155. BPN, 24 October 2011, para. 112.
156. BES, 3 August 2014, para. 89.
157. Banif, 21 December 2015, para. 131.
158. Banif, 21 December 2015, para. 141.
159. Abanka, 13 August 2014, para. 140.
160. NKBM, 18 December 2013, para. 135.
161. NLB, 18 December 2013, para. 154.

Factor Banka *W*	**Nationalisation**					
"The State recapitalisation will only be implemented after the complete implementation of the *wipe-out* of the shareholders' equity and subordinated debts. All existing shareholders and subordinated debt holders therefore fully contribute to the orderly winding down costs of the Bank prior to the granting of the State support."[162]						
Probanka *W*	**Nationalisation**					
"The State recapitalisation will only be implemented after the complete implementation of the wipe-out of the shareholders' equity and subordinated debts. All existing shareholders and subordinated debt holders therefore fully contribute to the orderly winding down costs of the Bank prior to the granting of the State support."[163]						
Catalunya Banc *C*		**Dilution**				
"With the implementation of the Restructuring Plan, all existing shareholders will be asked to bear losses in proportion to their stakes prior to any new capital injection under the MoU. As a result and given the significant capital needs of the Bank, all existing shareholders in the Bank other than the FROB, the founding savings banks, will be fully diluted and will lose all economic claims and all political/voting rights over the Bank."[164]						
NCG Banco *C*		**Dilution**				
"As established in recital (78), the State will acquire a significant ownership of NCG and its previous owners will be fully wiped out."[165] "The conversion of the convertible preference shares issued to the FROB in 2010 and the new capital injection mean that the old owners of NCG shares will lose all economic claims and other rights over NCG."[166]						

162. Factor Banka, 18 December 2013, para. 65.
163. Probanka, 18 December 2013, para. 66.
164. Catalunya Banc, 28 November 2012, para. 82.
165. NCG, 28 November 2012, para. 171.
166. NCG, 28 November 2012, para. 75.

BFA *C*		**Dilution**				
"As a result of that conversion, as of June 2012 the FROB owned 100% of the ordinary shares in BFA. Accordingly, the previous equity holders (the seven founding savings banks) lost all economic and political rights over the BFA Group."[167] "Based on the assessment made by the Spanish authorities on the economic value of BFA, the FROB will control 100% of BFA's capital. As a result, the seven founding savings banks will lose all control over BFA."[168]						
Banco Mare Nostrum *C*		**Dilution**				
"As established in recital (62), the State will acquire a significant ownership of BMN and the stake of its previous owners will be significantly reduced. The State will consequently receive a large part of future profits and/or the revenue from the envisaged listing of BMN in the future. The Commission therefore considers the level of remuneration associated with the State's stake in BMN of at least 64% as appropriate."[169] "All existing shareholders will bear losses proportionate to their stake prior to the injection of new capital and the SLE described below. Moreover, the mandatorily convertible contingent debt as described in recital (18) will be converted into equity prior to these measures. The consecutive absorption of accounting losses as of 31 December 2012 will lead to a remaining equity of approximately EUR [200 – 300] million."[170]						
Liberbank *C*						
This decision is remarkable in the sense that there is no mention of burden-sharing by shareholders.						

167. BFA, 28 November 2012, para. 91. See also para. 148 and 149: with the conversion of FROB's convertible preference shares into equity in BFA in June 2012, any pre-existing link between the seven founding savings Banks and the BFA Group was severed, in terms of ownership, control and operational involvement." "In terms of burden-sharing, they have relinquished any ownership rights in the BFA Group, and will not recover them in the future."
168. BFA, 27 June 2012, para. 28.
169. BMN, 20 December 2012, para. 147.
170. BMN, 20 December 2012, para. 59.

<table>
<tr><td>Banco de Valencia
T</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“Furthermore, the offer is made under the following assumptions: (i) The share purchase will be made only after the General Assembly of BVA adopts a capital reduction and, simultaneously, an increase of capital corresponding to the capital injection of EUR 4.5 billion by the FROB.”[171]
“The unitary nominal value of EUR 0.2 per share of existing minority shareholders will be reduced to the lowest possible unitary nominal value of EUR 0.01, as a result of the reduction and simultaneous increase of capital that the FROB will execute with effect of 30 October 2012. The capital reduction will result in a reduction of 95% of the nominal value of the shares.”[172]
“In this regard, the Commission observes that BVA’s previous owners will be fully wiped out as a result of the measures granted in the context of its restructuring, except for the minor compensation as described in recital (73).”[173]</td></tr>
<tr><td>Banco CAM
T</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“As regards the contribution of Banco CAM to the financing of the restructuring costs, the Commission observes that the stakeholders of that credit institution have suffered significant losses. More specifically, the cuotas participativas – equity instruments with non-voting rights which allow investors to receive a percentage of the after-tax profits distributed by the issuing company – have lost all value.”[174]
“Furthermore, since the FROB injected capital in the form of ordinary shares, it controls 100% of the voting rights in Banco CAM’s General Assembly.”[175]</td></tr>
<tr><td>UNNIM Banc
T</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“The Commission notes that the takeover of UNNIM Banc by BBVA results both in the total wiping out of former UNNIM Banc shareholders and in the disappearance of UNNIM Banc as a standalone entity.”[176]</td></tr>
<tr><td>Cajatres
T</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“Finally, the restructuring will take place through the merger of Cajatres into Ibercaja. Cajatres’ incumbent shareholders will hold a stake of around [0-20]% in the combined entity and will therefore experience a very significant dilution of their shareholdings as part of the restructuring effort.”[177]</td></tr>
</table>

171. Banco de Valencia, 28 November 2012, para. 34.
172. Banco de Valencia, 28 November 2012, para. 73.
173. Banco de Valencia, 28 November 2012, para. 178.
174. Banco CAM, 30 May 2012, para. 156.
175. Banco CAM, 30 May 2012, para. 157.
176. UNNIM Banc, 25 July 2012, para. 179.
177. Cajatres, 20 December 2012, para. 156.

<table>
<tr><td>Banco Galleco
T</td><td></td><td>Dilution</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“On 29 January 2013, Banco Gallego’s shareholders decided to reduce the equity of the Bank to zero by absorbing losses and, simultaneously, NCG increased the capital of Banco Gallego. As a result of that operation, on 18 March 2013, the FROB, indirectly through NCG, held 99.95% of Banco Gallego, the rest remaining in the hands of private shareholders.”[178]
“As described in recital (7) the existing private shareholders were nearly fully diluted as a result of a capital increase conducted by NCG on 18 March 2013.”[179]
“In that regard, the Commission observes that Banco Gallego’s previous owners were fully wiped out.”[180]</td></tr>
<tr><td>CajaSur
T</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“The Commission observes that the stakeholders of the credit institution lost ownership.”[181]</td></tr>
<tr><td>Caja Castilla-La Mancha
T</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“The Commission observes that the stakeholders of the credit institution lost ownership.”[182]</td></tr>
<tr><td>Banco CEISS
C</td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“The absorption of accounting losses as of 31 December 2012, followed by the conversion of the FROB Preference Shares and the required new capital injection to meet regulatory solvency levels mean that all existing shareholder will be asked to bear losses in proportion to their stakes prior to any new capital injection under the MoU.”[183]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>LBG
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“As regards the existing shareholders, they have been diluted by the State and private recapitalisations described above. In that way, they bore the consequence of the losses registered by LBG.”[184]</td></tr>
</table>

178. Banco Gallego, 25 July 2013, para. 7.
179. Banco Gallego, 25 July 2013, para. 59.
180. Banco Gallego, 25 July 2013, para. 126.
181. CajaSur, 8 November 2010, para. 81.
182. CCM, 29 June 2010, para. 172.
183. Banco CEISS, 20 December 2012, para. 59.
184. LBG, 18 November 2009, para. 163.

<table>
<tr><td>RBS
C</td><td></td><td>Dilution</td><td></td><td></td><td></td><td>Dividend ban</td></tr>
<tr><td colspan="7">“As regards the contribution of the existing shareholders, the Commission considers positively the fact that in exchange for its £20 billion recapitalisation in the group, the State received shares issued at a discount compared to the stock market price at the time of the announcement. This allowed it to own around 70% of RBS. This means that the aid did not wholly protect RBS’s shareholders against the consequences of the group’s past losses. On the contrary, they have been strongly diluted by the State recapitalisations. In that way, they bore the consequence of the losses registered by RBS. In addition, in case of conversion of the B shares in ordinary shares, it will lead to a further dilution of the existing shareholders.”[185]</td></tr>
<tr><td>B&B
S/T/W</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“Moreover, the UK has taken measures to minimise moral hazard, notably by excluding shareholders and possibly certain types of creditors from receiving the benefit of any aid in the context of the controlled winding-up procedure. This was achieved through the nationalisation of B&B by which its former shareholders were wiped-out under the Transfer Order.”[186]</td></tr>
<tr><td>Northern Rock
S/C/W</td><td>Nationalisation</td><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="7">“With regard to NR, the bank was nationalised and its former shareholders will only be compensated on the basis of the value of the company without any State support. As a consequence, this compensation is likely to be close to zero. This means that the former shareholders have been wiped-out and thus can be considered as having sufficiently supported the consequences of the failure of NR.”[187]</td></tr>
<tr><td>Dunferm-line
S/T/W</td><td></td><td></td><td></td><td>Remaining at the bad bank</td><td></td><td></td></tr>
<tr><td colspan="7">“As regards burden-sharing of the costs related to the impaired assets between the State, shareholders and creditors, the Commission notes that both the former members and the subordinated debt holders will contribute to the restructuring of the bank to the greatest extent possible as they remain with the Rump Dunfermline. Depending on their degree of subordination, they will bear the potential losses from assets held by Rump Dunfermline in accordance with ordinary bankruptcy laws.”[188]</td></tr>
</table>

185. RBS, 14 December 2009, para. 216.
186. B&B, 25 January 2010, para. 55.
187. Northern Rock, 28 October 2009, para. 149.
188. Dunfermline, 25 January 2010, para. 74.

Annex IX: Burden-sharing by hybrid and subordinated debt holders

The following table gives an overview of the burden-sharing by hybrid and subordinated debt holders in the bank State aid cases. As discussed in chapter 12, there are various forms of burden-sharing by hybrid and subordinated debt holders: Liability Management Exercise (LME) (see section 12.6.3.1), write-down (see section 12.6.3.2), remaining at the bad bank (see section 12.6.3.3) and the coupon ban (see section 12.6.3.4).

<table>
<tr><th>Bank</th><th>LME</th><th>Write-down</th><th>Remaining at the bad bank</th><th>Coupon ban</th></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>OVAG
C</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“The Commission further observes that ÖVAG offered to buy hybrid instruments back from private investors at the price corresponding to around 40% of their nominal value. The offered buy-back price was determined on the basis of the market value of the instruments and contained a premium of not more than 10 percentage points, which was added to incentivise investors to participate in the buy-back. The offer was accepted for almost 80% of the instruments’ total nominal value, which after taking the costs of the transaction into consideration left ÖVAG with a profit of EUR 130 million. The still outstanding instruments are subject to the coupon ban explained in recital (117). Therefore, the Commission considers that an adequate burden-sharing from ÖVAG’s private hybrid investors is ensured and the requirements of the Restructuring Communication in that respect are met.”[189]</td></tr>
<tr><td>BAWAG
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">This case is somewhat remarkable, because the dividend/coupon ban seemed to be sufficient burden-sharing.</td></tr>
<tr><td>Hypo Tirol
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Die Hypo Tirol hat zugesagt, im Falle von Verlusten im operativen Geschäft keine Kuponzahlungen vorzunehmen. Auf diese Weise wird im Einklang mit Randnummer 26 der Umstrukturierungsmitteilung sichergestellt, dass die Bank keine staatlichen Beihilfen zur Zahlung einer Vergütung für Eigenmittel verwendet, wenn die entsprechenden Geschäfte keine ausreichenden Gewinne abwerfen.”[190]</td></tr>
</table>

189. OVAG, 19 September 2012, para. 118
190. Hypo Tirol, 4 October 2012, para. 75.

HGAA *S/C/W*	**LME**			**Coupon ban**
"As regards the hybrid capital holders, HGAA has taken a number of steps to ensure their burden-sharing by buying back those instruments significantly below par or cancelling them altogether which has generated a significant capital effect.[191] Furthermore, the Commission notes that many of the hybrid capital instruments as well as the Partizipationskapital instruments only yield dividends or coupon payments in case of profits. Given the lack of profitability of the bank in recent years, the holders of those instruments have not received such payments. In addition, there will be restrictions on dividend and coupon pay-outs in the future. As a result, the Commission considers that there is sufficient burden-sharing from the holders of those instruments."[192]				
KA (2011) *S/C/W*			***Remaining at the bad bank***	**Coupon ban**
"Moreover, hybrid issuances (including the participation certificates from the previous owners) *have been split between KA Neu and KA Finanz* […], thus ensuring additional burden sharing, since the potential profits of KA Finanz will be skimmed off by the guarantee fees to be paid to the state."[193]				
KBC *C*	***LME***			**Coupon ban**
"Finally, the Commission notes that the Belgian authorities have committed that KBC *will not pay coupons or call* subordinated debt instruments, except where there is a legal obligation to do so. As a result, subordinated debt holders will receive limited remuneration and thus contribute to the restructuring."[194]				
Ethias *C*				***Coupon ban***
"The Commission notes that the holders of hybrid instruments should also bear to the extent possible the losses incurred by Ethias. In this respect, the Commission notes that – as confirmed by the CBFA – the hybrids issued by Ethias are not loss absorbing on a going concern basis. In particular Ethias has no discretion to suspend coupon payment. The possibility of coupons deferral is conditional on the inability of Ethias to meet solvency requirements in view of its annual audited accounts. As this condition has not been fulfilled during the period since the aid measure was announced, Ethias has not had discretion to defer coupon payments on its hybrids. As a result, the criterion of burden sharing does not require Ethias to refrain from payments of coupon payments on its hybrid instruments."[195]				

191. HGAA, 2013, para. 136.
192. HGAA, 3 September 2013, para. 136-137.
193. KA, 31 March 2011, para. 87
194. KBC, 18 November 2009, para. 166.
195. Ethias, 20 May 2010, para. 134.

<table>
<tr><td>Fortis (2008)
S/C/T/C</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">No mention of burden-sharing by subordinated debt holders</td></tr>
<tr><td>Dexia (2010)
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">See para. 201-205.</td></tr>
<tr><td>Dexia (2012)
S/C/T/W</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“DBB/Belfius will not distribute any form of dividend in respect of its shares. DBB/Belfius will not make any discretionary early repayment or payment of coupons on instruments (i) issued by DBB/Belfius before 20 October 2011, (ii) held by persons or entities other than DBB/Belfius and (iii) the payment or exercise of which is discretionary by virtue of the contractual provisions covering these instruments.”[196]

“The Commission notes that in 2012 DBB/Belfius repurchased its own debt on several occasions at substantial discounts ([50-100] % of the nominal value), which enabled it to generate a profit after tax of EUR [250-750] million. This profit corresponds to the losses sustained by bond holders and thus helps to share the burden.”[197] “The Commission also notes that the distribution of dividends, coupons and discretionary early repayments are suspended until 31 December 2014, which are all favourable elements.”[198]

“Dexia’s shareholders and security-holders have already contributed to the cost of restructuring. Since October 2008, the share price has fallen by over 95 %. Since the initial restructuring plan, Dexia has waived the payment of dividends and the payment or early repayment of discretionary coupons on its hybrid Tier 1 and Tier 2 instruments.”[199]

“The Commission takes a favourable view of the fact that DMA, the NEC and the JV will not distribute any form of dividend on their shares until 31 December 2015 (except for dividends paid by DMA to the NEC) and that DMA, the NEC and the JV will not pay coupons, except if contractually obliged to do so as a result of a commitment given before 14 December 2012.”[200]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>FIB
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“In that context the Bank <u>will suspend any coupon payments</u> on outstanding instruments until the State aid has been fully repaid. In particular the Bank will cancel coupon payments on its hybrid and perpetual bands.”[201]</td></tr>
</table>

196. Dexia, 28 December 2012, para. 286-287.
197. Dexia, 28 December 2012, para. 574.
198. Dexia, 28 December 2012, para. 575.
199. Dexia, 28 December 2012, para. 614.
200. Dexia, 28 December 2012, para. 682.
201. FIB, 25 November 2014, para. 118.

<table>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>CCB (2014)
C</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“There is no outstanding subordinated debt, junior debt or other hybrid/Tier 2 instruments issued by any of the CCIs or the CCB.”[202]</td></tr>
<tr><td>CCB (2015)
C</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“Moreover, there is no outstanding subordinated debt, junior debt or other hybrid/Tier 2 instruments issued by the group so that the options for burden-sharing by historical shareholders and subordinated debt holders are limited to a dilution of existing shareholders.”[203]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Amager-banken
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“Furthermore, shareholders and subordinated debt holders of Amagerbanken were totally wiped out, which constitutes their maximum possible own contribution in the restructuring of the New Bank.”[204]</td></tr>
<tr><td>Eik banki</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5"></td></tr>
<tr><td>Fionia Bank
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“Furthermore, the subordinated debt remains in Old Fionia. Subordinated debtholders will only be eligible to receive payments out of the profit of the winding-up of the Rump Bank after repayment of the State including a market-based annual interest of 10% and thus provide an appropriate own contribution to the restructuring.”[205]</td></tr>
<tr><td>Roskilde Bank
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“The investors having invested in old RB’s equity and subordinated capital may only get some future compensation via a so-called earnout mechanism after the DNB and DPB are repaid at subscription value plus interest.”[206]</td></tr>
<tr><td>FIH Holding
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Further, FIH will not make any coupon payments to investors in hybrid instruments or any instrument for which financial institutions have discretion to pay coupons or to call, regardless of their regulatory classification, including subordinated debt instruments, if no legal obligation to make payments exists.”[207]</td></tr>
</table>

202. CCB, 24 February 2014, para. 138.
203. CCB, 18 December 2015, para. 102.
204. Amagerbanken, 25 January 2012, para. 108.
205. Fionia, 25 October 2010, para. 79.
206. Roskilde Bank, 5 November 2008, para. 62.
207. FIH, 11 March 2014, para. 133.

CIF *W*				
The limited burden-sharing in this case was justified.				
BayernLB *C*				**Coupon ban**
"[No servicing of hybrid capital] BayernLB will adhere to a ban on the servicing of hybrid capital. BayernLB will service hybrid capital (such as silent participations (stille Einlagen) and profit participation certificates (Genussscheine)) only if it is obliged to do so even without a release of reserves (Rücklagen) or of the special item referred to in Section 340 f and g of the Commercial Code. […]."[208]				
Commerz-bank *C*				**Coupon ban**
"Nevertheless they shoulder part of the burden through the ban on dividend payments and on using reserves for coupon payments. The Commission is convinced that there is a limit to imposing a heavier burden on the holders of hybrid capital instruments at Commerzbank."[209]				
HRE *C*				**Coupon ban**
"Furthermore, as regards HRE's subordinated debt holders, Germany has provided a commitment that HRE will not make discretionary payments on profit-related financial instruments to third parties, thereby ensuring that Tier 2 capital holders will get little or no compensation for their investment and will thus participate in the burden sharing in the same way as Tier 1 capital holders."[210]				
HSH Nordbank *C*				**Coupon ban**
"[Hybrids] Until 31 December 2014, HSH may not make any payments in respect of profit-related equity instruments (such as hybrid financial instruments and profit participation certificates (Genussscheine)), in so far as those payments are not owed on the basis of a contract or the law. If HSH's balance sheet, before adjustment of reserves and retained earnings, shows a loss, those instruments will also participate in the loss. There will be no participation in losses brought forward from previous years."[211]				

208. BayernLB, 5 February 2013, annex point 27.
209. Commerzbank, 7 May 2009, para. 107.
210. HRE, 18 July 2011, para. 122.
211. HSH Nordbank, 20 September 2011, Annex II point 2.

IKB *C*				
No mention of burden-sharing by subordinated debt holders				
LBBW *C*				**Coupon ban**
"Due to the prohibition on appropriating reserves for the servicing of coupons for tier 1 and tier 2 instruments, the lower-ranking capital owners are also contributing to the restructuring of LBBW."[212]				
NordLB *C*				**Coupon ban**
"[Hybrids] NORD/LB will not service hybrid capital instruments unless it is under a legal obligation to do so and does not need to release reserves and special items in accordance with Section 340(f) and (g) of the German Commercial Code. In this context hybrid capital instruments include all subordinate capital instruments that are serviced contractually or according to their terms of issue only if for the given period there are sufficient earnings before taxes or consolidated profit in accordance with the German Commercial Code."[213]				
SachsenLB *T*				
No mention of burden-sharing by subordinated debt holders				
Sparkasse KolnBonn *C*				**Coupon ban**
"The bank has no discretion to suspend or to delay the payment of a coupon on the hybrid instruments if it generates profit in a given year. However, the holders of hybrid instruments also bear to the extent possible the losses incurred by Sparkasse KölnBonn, as both coupon payment and principal of the hybrid capital were suspended or participated in the absorption of Sparkasse KölnBonn's losses. Therefore, the Commission considers that the maximal possible burden-sharing from its private hybrid investors is ensured and therefore the requirements of the Restructuring Communication for the contribution to the restructuring costs by the private investors are met."[214]				
WestLB (2011) *W*				
No mention of burden-sharing by subordinated debt holders				

212. LBBW, 15 December 2009, para. 98.
213. NordLB, 25 July 2012, annex point 9.
214. Sparkasse KolnBonn, 29 September 2010, para. 90.

Alpha Bank *C*	**LME**			**Coupon ban**
"The Bank's subordinated debt holders have contributed to the restructuring costs of the Bank. The Bank performed several *liability management exercises* in order to generate capital. The total amount of liabilities exchanged reached EUR 828 million, with a capital gain of EUR 436 million, as described in recital (114). The still outstanding instruments are subject to the *coupon ban* mentioned in recital (124). Therefore, the Commission considers that an adequate burden-sharing from the bank's private hybrid investors is ensured and the requirements of the Restructuring Communication in that respect are met."[215]				
EFG Eurobank *C*	**LME**			**Coupon ban**
"The Bank's subordinated debt holders have contributed to paying for the restructuring costs of the Bank. The Bank performed several *liability management exercises* in order to generate capital. The total amount of liabilities exchanged amounted to EUR 748 million, with a capital gain of EUR 565 million, as described in recitals (122) and (123). The still outstanding instruments are subject to the *coupon ban* described in recital (133). Therefore, the Commission considers that an adequate burden-sharing from the bank's private hybrid investors is ensured and the requirements of the Restructuring Communication in that respect are met."[216]				
Pireaus Bank *C*	**LME**			**Coupon ban**
"The Bank's hybrid and subordinated debt holders have contributed to the restructuring costs of the Bank. The Bank has performed several *liability management exercises* in order to generate capital, as described in recital (134). The still outstanding instruments are subject to the *coupon ban* mentioned in recital (143). Therefore, the Commission considers that an adequate burden-sharing from the Bank's hybrid and subordinated debt holders is ensured and the requirements of the Restructuring Communication in that respect are met."[217]				
National Bank of Greece *C*	**LME**			**Coupon ban**
The Bank's subordinated debt holders have contributed to the restructuring costs of the Bank. The Bank has performed several *liability management exercises* in order to generate capital, as described in recitals (149) and (150). The still outstanding instruments are subject to the *coupon ban* mentioned in recital (159). Therefore, the Commission considers that an adequate burden-sharing from the bank's private hybrid investors is ensured and the requirements of the Restructuring Communication in that respect are met.[218]				

215. Alpha Bank, 9 July 2014, para. 294-295.
216. Eurobank, 29 April 2014, para. 393-394.
217. Piraeus Bank, 23 July 2014, para. 348-349.
218. NBG, 23 July 2014, para. 399-400.

<table>
<tr><td>T Bank
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“The shareholders and subordinated debt holders are not transferred and remain in the entity in liquidation. They will be entitled to proceeds from the liquidation only if the proceeds are sufficient to repay first the Resolution Scheme, which has a priority claim over the other creditors. Knowing that there are no more assets in T Bank, it is very likely that the shareholders and subordinated debt holders will not get back their investments.”[219]</td></tr>
<tr><td>TT Hellenic Postbank
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“Concerning burden-sharing of shareholders and subordinated debt holders, the Commission has already established, in recital 100 of the New TT Opening Decision, that the shareholders and subordinated debt holders were not transferred to New TT Bank but have remained in TT Bank, that is to say, the entity in liquidation. Hence, the Commission considered that sufficient burden-sharing of shareholders and subordinated debt holders was achieved.”[220]</td></tr>
<tr><td>(Nea) Proton Bank
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“Concerning burden-sharing of shareholders and subordinated debt holders, the Commission notes that the shareholders and subordinated debt holders were not transferred to Nea Proton Bank but have remained in the entity in liquidation. Therefore, there is a high probability that they will lose their investments. That burden-sharing reduces the aid amount needed. Hence, the Commission considers that sufficient burden-sharing of shareholders and subordinated debt holders is achieved.”[221]</td></tr>
<tr><td>ATE (2011)
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Dividend, Coupon and Call ban: The Hellenic Republic commits that ATE will not pay any coupon or dividend on own funds instruments by using the capital or reserves of ATE for two years except where there is a legal obligation to do so. Furthermore, ATE shall not exercise a call option in respect of those own fund instruments.”[222]</td></tr>
<tr><td>ATE (2013)
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“The Greek authorities did not transfer shares or subordinated debt to Piraeus Bank.”[223]</td></tr>
</table>

219. T Bank, 16 May 2012, para. 51.
220. Eurobank, 29 April 2014, para. 257.
221. Nea Proton Bank, 26 July 2012, para. 77.
222. ATE, 23 May 2011, para. 42.
223. ATE, 3 May 2013, para. 74.

<table>
<tr><td>Panellinia Bank
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“The equity and preference shares are not transferred to the Buyer but remain in the Bank, the entity in liquidation. Moreover, the Bank does not have any subordinated debt holders.”[224]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>FHB
C</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">No mention of burden-sharing by subordinated debt holders</td></tr>
<tr><td>MKB
C</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">MKB Bank had no outstanding subordinated debt.</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Anglo/INBS
W</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">Subordinated debt holders have also contributed to a significant extent to the restructuring by means of two Liability Management Exercises (hereinafter referred to as ’LMEs’) in Anglo and one in INBS.

In total, the merged entity will hold EUR 500 million of subordinated liabilities (as at 31 December 2010), significantly less than the subordinated debt held by Anglo and INBS at 31 December 2008 (respectively EUR 5 billion and EUR 300 million), illustrating the massive losses taken by subordinated bond holders. Ireland has committed, in addition, that the merged entity will not pay coupons or exercise calls on subordinated debt instruments and hybrid capital instruments, unless it is legally obliged to do so.</td></tr>
<tr><td>AIB/EBS
C</td><td>LME</td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“With regard to subordinated debt holders, a series of <u>Liability Management Exercises/Debt Buy Backs</u> were carried out between 2009 and 2011, which have contributed EUR 5,4 billion of Core Tier 1 capital (buy back of Tier 1 and Tier 2 instruments). Currently, only a marginal amount of subordinated debt remains in the Bank (i.e. around EUR 34 million at 31 December 2012) […]. Therefore, subordinated creditors have adequately contributed to bearing the restructuring costs.”[225]</td></tr>
</table>

224. Panellinia Bank, 16 April 2015, para. 84.
225. AIB/EBS, 7 May 2014, para. 122.

BOI (2010) *C*				**Coupon ban**
"Finally, as regards the subordinated debt holders, the Commission notes positively that BOI complies with the Commission's policy on Tier 1 and Tier 2 capital instruments set out in point 26 of the Restructuring Communication. By virtue of its participation in the CIFS and ELG scheme, BOI was already subject to a *ban on the payment of discretionary hybrid coupons* in line with the Commission's guidance."[226]				
BOI (2011) *C*	**LME**			
"The Commission further notes that the need for additional State aid has been limited to a significant extent by the *liability management exercises* carried out in July and December 2011, while new capital has been raised on the market."[227]				
IL&P (PTSB) *C*	**LME**			
"PTSB also conducted several *liability management exercises* in 2011 and 2012, representing significant burden-sharing on the part of PTSB's creditors. Over the course of 2011, PTSB bought back its own subordinated debt with a book value of EUR 1.2 billion for a cash consideration of EUR 0.2 billion, leading to a EUR 1.0 billion loss for subordinated debt holders. In 2012, PTSB bought back its own subordinated debt with a book value of EUR 1.2 billion, for a cash consideration of EUR 0.9 billion, leading to approximately EUR 0.2 billion loss for subordinated debt holders. Therefore, subordinated creditors have adequately contributed to bearing the restructuring costs."[228]				
Quinn Insurance *S/T/W*				
No mention of burden-sharing by subordinated debt holders				
MPS *C*				**Coupon ban**
"Moreover MPS commits to a dividend ban until the capital increase has been completed as well as a coupon ban, a ban on advertisement and aggressive pricing strategies and some restrictions on liability managements; those commitments are detailed in the Annex."[229]				

226. Bank of Ireland, 15 July 2010, para. 217.
227. Bank of Ireland, 20 December 2011, para. 160.
228. IL&P, 9 April 2015, para. 87.
229. MPS, 27 November 2013, para. 74.

<table>
<tr><td>BRC
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“Subordinated debt is not transferred to ICCREA but remains in the entity in liquidation. While the subordinated debt holders are in principle entitled to proceeds from the liquidation the FDGCC has first claim on repayment of the cost of the intervention before other creditors will be served. Given that the FDGCC claim exceeds the book value of the residual assets (see Table 1), subordinated debt holders will in all likelihood not benefit from the proceeds of the liquidation.”[230]</td></tr>
<tr><td>Banca Tercas</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“However, EUR 189 million (as of 31 March 2014) of subordinated debt of Tercas on a consolidated basis (including its subsidiary Caripe) should have been converted or written down in line with the requirements envisaged in the 2013 Banking Commission in order to reduce the capital shortfall and minimise the amount of aid. The Commission notes that no such conversion or write-down was performed.”[231]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Parex banka
S/C/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“Subordinated loans by legacy shareholders will be junior liabilities in Parex banka. The liquidation of the assets of Parex banka in the base case scenario does not envisage that sufficient proceeds will be received to cover more than senior liabilities in the bank.”[232]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>LCCU
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Further, the Lithuanian authorities confirmed that LCCU had no hybrid instruments with discretionary coupons. In addition, Lithuania confirmed that it would seek prior approval from the Commission before the LCCU repays any subordinated debt earlier than contractually envisaged. That commitment will apply until the LCCU fully repays the State capital.”[233]</td></tr>
<tr><td>AB Ukio Bankas
S/T/W</td><td></td><td></td><td>Remaining at the bad bank</td><td></td></tr>
<tr><td colspan="5">“In view of the capital gap it is not expected that either the shareholders or subordinated loans holders will receive any compensation as a result of the bankruptcy proceedings.”[234]</td></tr>
</table>

230. BRC, 2 July 2015, para. 71.
231. Banca Tercas, para. 201.
232. Parex banka, 15 September 2010, para. 148.
233. LCCU, 26 September 2012, para. 21.
234. AB Ukio Bankas, 14 August 2013, para. 82.

Kaupthing Bank Luxem-bourg *S/T/W*				
No mention of burden-sharing by subordinated debt holders				
ABN AMRO *C*				**Coupon ban**
"Against that background, a *hybrid coupon and hybrid call ban* of 2 years seems to provide appropriate burden-sharing from the company's capital holders."[235]				
ING *C*				***Coupon ban***
"The calling of Tier 2 capital and Tier 1 hybrids will in the future be proposed case by case to the Commission for authorisation."				
SNS REAAL (2010) *C*				
"At the end of September 2009, SNS announced (after consultation with the Commission) that it would repay subordinated debt below par and issue new subordinated debt at market conditions (exchange of subordinated debt)."[236]				
SNS REAAL (2013) *C*		**Write-down**		
"As regards the increased burden-sharing requirements under the 2013 Banking Communication, the Commission notes that the Dutch State has not bailed out the shareholders of SNS REAAL and the hybrid debt-holders of SNS REAAL and SNS Bank. As described in recital (13), those shareholders and hybrid debt-holders were expropriated and will only receive a fair compensation in line with the relevant provisions of Dutch law."[237]				

235. ABN AMRO, 5 April 2011, para. 315.
236. SNS REAAL, 28 January 2010, para. 30.
237. SNS REAAL, 19 December 2013, para. 92.

<table>
<tr><td>Aegon
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“The commitment by the Netherlands whereby AEGON will not make dividend payments to its common stock holders and will not call or repurchase any of the outstanding hybrid securities prior to the full repayment of the CCS ensures that the owners and hybrid instrument holders of AEGON contribute to the restructuring.”[238]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>CGD
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Ban on dividend, coupon and interest payments: CGD will not (and shall procure that none of its subsidiary undertakings shall) make any payments of dividends, coupons or interest to holders of preference shares and subordinated debt, in so far as those payments are not owed on the basis of contractual or legal obligations.”[239]
NB: this case was characterised by a breach of the dividend ban.</td></tr>
<tr><td>BPI
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">NB: this case was characterised by a breach of the dividend ban.</td></tr>
<tr><td>BCP
C</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Ban on coupon payments: BCP will not make any coupon and interest payments to third parties on hybrid instruments and subordinated debt which are not held by Portugal, where there is no legal obligation to proceed with such payment.”[240]</td></tr>
<tr><td>BPN
T</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“However, the Commission notes that subordinated bond holders, holding an amount of EUR 245 million, will be maintained in the bank that is being privatised and may continue to receive coupons.”[241]

“However, since the bank is now being sold, a ban on calls until 31 December 2016 is necessary to provide a minimum level of burden-sharing from the bank’s capital holders.
In this respect, the Commission takes stock of the commitment by Portugal that, in order to contribute to the restructuring process of BPN, Banco BIC, the combined entity and Portugal will not exercise until 31 December 2016 any call option rights in relation to subordinated debt issued by BPN prior to the date of the sale.”[242]</td></tr>
</table>

238. Aegon, 17 August 2010, para. 110.
239. CGD, 24 July 2013, annex point 6.7.
240. BCP, 30 August 2013, annex point 4.8.
241. BPN, 27 March 2012, para. 239.
242. BPN, 27 March 2012, para. 243-244.

BES *S/C/W*			**Remaining at the bad bank**	
"All shareholders and subordinated creditors will be *left in the Bad Bank*."[243]				
Banif *S/T/W*		**Write-down**		
"As resolution measure, Portugal will apply the Sale of Business resolution tool combined with the Bail-in tool which under the Portuguese implementation law of Directive 2014/59/EU is already applicable in 2015."[244]				
Abanka *C*		**Write-down**		
"To ensure adequate burden-sharing and participation of Abanka's existing investors in the restructuring, the equity holders and all subordinated debt holders *were written down in full* prior to the first recapitalisation."[245]				
Abanka/ Banka Celje		**Write-down**		**Coupon ban**
"To ensure adequate burden-sharing and participation of the existing investors in the restructuring, the equity holders and all subordinated debt holders *were written down in full* prior to the recapitalisation. To that end, Bank of Slovenia has, through a specific order, frozen all the subordinated-debt issued by the bank, of which instruments that were to mature before the adoption of the decision. Those subordinated debt instruments maturing before the date of adoption of the decision are also subject to the *bail in*. After the recapitalisation the State will become the sole shareholder."[246]				
NKBM *C*		**Write-down**		
"The Commission positively notes that the contribution of subordinated debt holders is achieved to the maximum extent possible, thus ensuring adequate burden-sharing. The State capital recapitalisation will only be implemented after the complete implementation of the wipe-out of the subordinated debt holders."[247]				
NLB *C*		**Write-down**		
"The Commission positively notes that the contribution of subordinated debt holders is achieved to the maximum extent possible, thus ensuring adequate burden-sharing. The State capital injections will only be implemented after the complete implementation of the wipe-out of the subordinated debt holders."[248]				

243. BES, 3 August 2014, para. 89.
244. Banif, 21 December 2015, para. 131.
245. Abanka, 13 August 2014, para. 140.
246. Abanka / Banka Celje, 16 December 2014, para. 168.
247. NKBM, 18 December 2013, para. 135.
248. NLB, 18 December 2013, para. 154.

<table>
<tr><td>Factor Banka
W</td><td></td><td>Write-down</td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“The State recapitalisation will only be implemented after the complete implementation of the wipe-out of the shareholders’ equity and subordinated debts. All existing shareholders and subordinated debt holders therefore fully contribute to the orderly winding down costs of the Bank prior to the granting of the State support.”[249]</td></tr>
<tr><td>Probanka
W</td><td></td><td>Write-down</td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“The State recapitalisation will only be implemented after the complete implementation of the wipe-out of the shareholders’ equity and subordinated debts. All existing shareholders and subordinated debt holders therefore fully contribute to the orderly winding down costs of the Bank prior to the granting of the State support.”[250]</td></tr>
<tr><td></td><td></td><td></td><td></td><td></td></tr>
<tr><td>Catalunya Banc
C</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“As described in section 3.2.1, all hybrids and subordinated debt instruments will be converted into equity following a material haircut on their nominal prices, leading to a decrease in the capital shortfall.”[251]</td></tr>
<tr><td>NCG Banco
C</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“First, the Commission notes positively that the commitments regarding the burden-sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (76) to (78), all hybrids except dated subordinated debt will be converted into equity.”[252]</td></tr>
<tr><td>BFA
C</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“As described above in recital (39), all hybrids and subordinated debt instruments will be converted into equity following a haircut on their nominal prices, further decreasing the BFA Group’s capital shortfall. As the Commission would consider a cash buyback of hybrids securities at market price plus a 10% premium to fulfil the requirements of the Restructuring Communication, it welcomes the commitment by Spain, which results in greater burden-sharing and consequently a decrease in the public funds that are needed to restore viability.”[253]</td></tr>
</table>

249. Factor Banka, 18 December 2013, para. 65.
250. Probanka, 18 December 2013, para. 66.
251. Catalunya Banc, 28 November 2012, para. 174.
252. NCG, 28 November 2012, para. 170.
253. BFA, 28 November 2012, para. 201.

<table>
<tr><td>Banco Mare Nostrum
C</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“First, the Commission notes positively that the commitments regarding the burden-sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (60) to (62), all hybrids except dated subordinated debt will be converted into equity.”[254]</td></tr>
<tr><td>Liberbank
C</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“First, the Commission notes positively that the commitments regarding the burden-sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (47) to (49), all hybrids will be converted into equity and CoCos eligible as Core Tier 1.”[255]</td></tr>
<tr><td>Banco de Valencia
T</td><td>LME</td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“Moreover, the Commission notes positively that the commitments regarding the burden-sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (74)-(75), all hybrid capital instruments will also be subject to significant burden-sharing.”[256]</td></tr>
<tr><td>Banco CAM
T</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“As a result, on 24 February 2012, the Commission agreed to a buy-back of a total amount of EUR 167.25 million of subordinated debt held by institutional investors for a price over nominal of 75%. Banco CAM announced on 23 September 2011 through the CNMV that the coupon payment on the Hybrid Securities due on 25 September 2011 would be suspended. Spain has agreed to suspend any payment of coupons until the Commission has decided on the restructuring aid. Finally, as a consequence of the rescue of Banco CAM by BOS, CAM’s Preference Shares have a market value of 0. Therefore, burden sharing has also been applied to the holders of the Hybrid Securities.”[257]</td></tr>
<tr><td>UNNIM Banc
T</td><td></td><td></td><td></td><td></td></tr>
<tr><td colspan="5">No mention of burden-sharing by subordinated debt holders</td></tr>
</table>

254. BMN, 20 December 2012, para. 146.
255. Liberbank, 20 December 2012, para. 127.
256. Banco de Valencia, 28 November 2012, para. 178.
257. Banco CAM, 30 May 2012, para. 159.

<table>
<tr><td>Cajatres
T</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“First, the Commission notes positively that the commitments regarding the burden-sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (64) to (66), all institutional holders of dated subordinated debt instrument will be offered the option to convert their debt instruments, – subject to a [0-5]% monthly haircut – into new senior debt securities with the same maturity as the original instrument with a zero coupon, and thereby lead to significant haircuts of [20-30]% for the hybrids instruments maturing in 2014 and [60-70]% for the hybrids instruments maturing in 2016.”[258]</td></tr>
<tr><td>Banco Galleco
T</td><td>LME</td><td></td><td></td><td></td></tr>
<tr><td colspan="5">“Moreover, the Commission notes positively that the commitments regarding the burden-sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (59) and (60), all hybrid capital instruments will also be subject to significant burden-sharing. As the Commission would normally consider an exchange of hybrid capital instruments at market price plus a premium into cash to fulfil the requirements of the Restructuring Communication. In that respect, it welcomes that commitment by Spain which results in the maximum legally possible burden-sharing by hybrid instrument holders.”[259]</td></tr>
<tr><td>CajaSur
T</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“As regards the holders of the Hybrid Securities, since the date on which CajaSur was intervened by the BOS, quarterly payments of coupons on the Hybrid Securities have been suspended and no Hybrid Securities have been called by CajaSur. Therefore, burden sharing has also been applied to the holders of the Hybrid Securities.”[260]</td></tr>
<tr><td>Caja Castilla-La Mancha
T</td><td></td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“Due to legal constrains, subordinated debt holders are to be transferred to Banco Liberta. Notwithstanding this, in order for them to contribute to the restructuring process of CCM, the Spanish authorities provided the commitment that Banco Liberta’s will not exercise any call options during the period it enjoys financial support from the FGD.”[261]</td></tr>
<tr><td>Banco CEISS (2012)</td><td>LME</td><td></td><td></td><td>Coupon ban</td></tr>
<tr><td colspan="5">“First, the Commission notes positively that the commitments regarding the burden sharing of hybrid instruments go beyond the prerequisites of the Restructuring Communication. As described in recitals (60) to (62), all hybrids except dated subordinated debt will be converted into equity.”[262]</td></tr>
</table>

258. Cajatres, 20 December 2012, para. 151.
259. Banco Gallego, 25 July 2013, para. 126.
260. CajaSur, 8 November 2010, para. 83.
261. CCM, 29 June 2010, para. 71.
262. Banco CEISS, 20 December 2012, para. 151.

LBG *C*				**Coupon ban**
"Finally, as regards the subordinated debt holders, the Commission notes positively that LBG will comply with the Commission's policy on Tier 1 and Tier 2 capital instruments set out in point 26 of the Restructuring Communication. As described in recital 112 above, LBG will *shall not pay investors any coupon* on capital instruments or exercise any call option rights in relation those instruments between 31 January 2010 and 31 January 2012 unless there is a legal obligation to do so."[263]				
RBS *C*				**Coupon ban**
"Finally, as regards the contribution of the subordinated debt holders, the Commission notes positively that RBS will comply with the Commission's policy on Tier 1 and Tier 2 capital instruments set out in point 26 of the Restructuring Communication. As described in recital (104) above, RBS *will not pay investors any coupon* on capital instruments or exercise any call option rights in relation to those instruments for a two year period unless there is a legal obligation to do so."[264]				
B&B *S/T/W*			**Remaining at the bad bank**	**Coupon ban**
"As regards B&B's hybrid debt holders who remained with Rumpco, the Commission notes positively that the UK undertook to conduct a restrictive policy on coupon payments and call options on hybrid capital. In particular, Rumpco will not make payments of interest and principal on the hybrids before the statutory debt will have been repaid with the exception of payments under the Capital Funding Notes. In addition, the Commission notes that Rumpco shall not be recapitalised in order to prevent a breach of minimum regulatory capital requirements upon such payments."[265]				

263. LBG, 18 November 2009, para. 164.
264. RBS, 14 December 2009, para. 217.
265. B&B, 25 January 2010, para. 55.

Northern Rock *S/C/W*			**Remaining at the bad bank**	**Coupon ban**
"Furthermore, NR's subordinated debt holders *will remain with AssetCo*. This means that they will be compensated through the amounts that are recovered from AssetCo's assets. As subordinated debt holders, […]. The State, on the other hand, will be a senior creditor by virtue of the loans (BoE/HMT liquidity facility and the working capital facility) it has provided to AssetCo. Therefore, […]. In addition, NR has recently decided to defer coupon payments and payments on the principal on cumulative Tier-2 and related Tier-1 instruments where it has discretion to do so. The United Kingdom has furthermore provided a commitment that AssetCo will continue to defer those payments after the split-up. […]." [266]				
Dunferm-line *S/T/W*			**Remaining at the bad bank**	
"The subordinated debt holders will in any case not benefit from the measures taken by the UK authorities to prevent Dunfermline's failure. They *are part of the Rump Dunfermline* which is in the process of being liquidated. They rank last or second last and will only be paid out after all the other creditors have been compensated. In this regard, the Commission also notes that the depositors, which in building societies such as Dunfermline are also the owners, have lost all ownership rights in the Rump Dunfermline."[267]				

266. Northern Rock, 28 October 2009, para. 150.
267. Dunfermline, 25 January 2010, para. 120.

Annex X: Acquisition ban

The following table lists the cases that are characterised by an acquisition ban. In particular, the table gives an overview of two modalities of the acquisition ban: i.e. the scope and the exemptions.

<u>Scope</u>
As discussed in section 13.9.3.2, many acquisition bans entail that the beneficiary bank shall not acquire *any stake* in *any undertaking*. The following table indicates whether the scope of the acquisition comprises any stake in any undertaking (indicated by "yes") or whether the scope of the acquisition ban is formulated in a different manner (indicated by "no").

<u>Exemptions</u>
As discussed in section 13.9.3.3, there are three main exemptions to the acquisition ban. In the following table, these three exemptions are mentioned under the headings "Commission approval", "Purchase price is less than [...]", and "Ordinary course of business". An "x" indicates that the exemption is present, whilst a "0" indicates that the exemption is not present.

Bank	Scope: Any stake in any undertaking?	Commission approval	Purchase price is less than [...]	Ordinary course of business	Other exemptions
OVAG	yes	x	0	x	0
BAWAG	no[268]	x	0	0	x
Hypo Tirol	yes	x	x	x	0
HGAA	yes	x	x	x	0
KA (2011)	yes	x	0	0	x

268. The acquisition ban applied to "any financial institutions or other businesses in actual or potential competition with BAWAG".

Bank	Scope: Any stake in any undertaking?	Commission approval	Purchase price is less than […]	Ordinary course of business	Other exemptions
KBC	no[269]	x	0	0	0
Ethias	no[270]	0	0	0	x
Fortis	no[271]	0	0	0	x
Dexia (2010)	no[272]	x*	0	0	x
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
FIB	yes	x	x	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
CCB	yes	x	x	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
CIF	yes	0	0	0	x[273]
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
FIH	yes	x	x	x	0

269. "The Belgian authorities commit that KBC will refrain from acquiring *control* of financial institutions. KBC will moreover refrain from acquiring control of businesses other than financial institutions if such an acquisition would slow down the repayment of state aid."
270. "Ethias commits not to acquire more than 5% of the capital of other credit institutions or investment firms."
271. "BNP Paribas is firmly committed, for a period of four years, not to acquire *control* of other credit institutions or investment companies (within the meaning of Directive 2004/39/EC of 21 April 2004 on markets in financial instruments) that have their registered office, a subsidiary or a branch in Belgium or Luxembourg and have substantial operations there."
272. The acquisition ban applied to "any acquisition of more than 5% of the share capital of other credit institutions or investment firms or insurance companies".
273. "Il ne prendra aucune participation dans une entreprise, que ce soit par cession d'actifs ou par transfert d'actions, sauf dans le cadre des opérations de simplification juridique et de centralisation de la gouvernance strictement prévues dans le plan de résolution ordonnée".

Bank	Scope: Any stake in any undertaking?	Commission approval	Purchase price is less than […]	Ordinary course of business	Other exemptions
Commerz-bank	no[274]	x	0	0	x
HSH Nordbank	yes	x*	0	x	0
HRE	yes	x	0	x	x
LBBW	no[275]	0	0	x	0
BayernLB	no[276]	0	x	x	0
Sparkasse KolnBonn	no[277]	x*	0	0	0
NordLB	yes	0	x	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
Alpha Bank	yes	x	x	x	0
Eurobank	yes	x	x	x	0
Piraeus Bank	yes	x	x	x	0
NBG	yes	x	x	x	0
ATE (2011)	no[278]	x	0	0	x

274. The acquisition ban applied to "any finance institutions or other businesses in potential competition with Commerzbank".
275. The acquisition ban applied to "any purchases of financial institutions in competition with LBBW".
276. There will be no expansion of business activities through the acquisition of *control* over other firms with a sales price of more than EUR [0-2 million] without the Commission's approval ('no external growth').
277. "Sparkasse KölnBonn is not to acquire more than 20% of the shares in other *financial institutions* during a period of three years. Other participation transactions that are not related to Sparkasse KölnBonn's original customer business in its business model may still be carried out, provided they do not jeopardise the Sparkasse's viability and *have been approved by the European Commission*. In addition, Sparkasse KölnBonn is to refrain from acquiring participations that are not necessary for its core business, or that entail excessive risks."
278. The acquisition ban applied to stakes *of more than 5%*.

Bank	Scope: Any stake in any undertaking?	Commission approval	Purchase price is less than […]	Ordinary course of business	Other exemptions
Anglo / INBS	yes	x*	0	x	0
AIB / EBS	yes	x	x	x	0
BOI (2010)	no[279]	0	x	0	0
BOI (2011)	no[280]	0	x	0	0
IL&P (PTSB)	yes	x	x	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
MPS	yes	x	x	x	x
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
Parex Banka	yes	0	0	0	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
LCCU	yes	x	x	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
ABN AMRO	yes	0	x	0	x
ING	no[281]	x	0	0	0
SNS REAAL	yes	x	x	x	0
AEGON	no[282]	0	0	0	x

279. The acquisition ban applied to "i) any financial institution; ii) any acquisition that would alter the bank's business model".
280. The acquisition ban applied to "i) any financial institution; ii) any acquisition that would alter the bank's business model".
281. The acquisition ban applied to acquisitions of financial institutions and any other acquisitions of businesses that would slow down the repayment of the state aid.
282. The ban applied to acquisitions of stakes of 20% or more.

Bank	Scope: Any stake in any undertaking?	Commission approval	Purchase price is less than […]	Ordinary course of business	Other exemptions
CGD	yes	0[283]	x	x	x
BPI	yes	x	x	x	0
BCP	yes	x	x	x	0
BPN	yes	0	x	0	0
BES	yes	x	x	x	0
Banif	yes	0	0	0	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
Abanka	yes	x	x	x	x
NKBM	yes	x	x	x	x
NLB	yes	x	x	x	x
Factor Banka	yes	0	0	x	0
Probanka	yes	0	0	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
Catalunya Banc	yes	0	x	x	0
NCG Banco	yes	x	x	x	0
BFA/ Bankia	yes	0	x	x	0
Banco Mare Nostrum	yes	0	x	x	0
Liberbank	yes	0	x	x	x
Banco CEISS	yes	x	x	x	0
Bank	**Scope: Any stake in any undertaking?**	**Commission approval**	**Purchase price is less than […]**	**Ordinary course of business**	**Other exemptions**
LBG	no[284]	0	x	0	0
RBS	no[285]	0	x	0	0
Northern Rock	yes	0	0	0	0

283. Acquisitions that must be made in order to maintain financial and/or association related stability, or in the interests of effective competition, had to be approved beforehand *by the Monitoring Trustee*.
284. The acquisition ban applied to “i) any financial institution, ii) any other acquisition whose purpose is to expand the bank’s activities outside of its business model”.
285. The acquisition ban applied to “i) any financial institution, ii) any other acquisition whose purpose is to expand the bank’s activities outside of its business model”.

Annex XI: Price leadership ban and other pricing restrictions

The following table gives an overview of the bank State aid cases that are characterised by a price leadership ban or other pricing restrictions (see section 13.10) and/or a ban on aggressive commercial practices (see section 13.11). In particular, the table indicates *where* these behavioural restrictions are mentioned *in the Restructuring Decisions*.[286] The symbol "-" indicates that the behavioural restriction was not mentioned in the Restructuring Decision.

Bank	Price leadership ban	Pricing restrictions	Ban on aggressive commercial practices
OVAG *C*	Annex point 8.4	-	-
BAWAG *C*	-	-	-
Hypo Tirol *C*	Para. 81, annex point 16	-	-
HGAA *S/C/W*	-	Para. 147	Para. 153
KA (2011) *S/C/W*	-	Para. 34, 82	-
KA (2013) *W*	Para. 76, annex point 6	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
KBC *C*	Para. 67	-	-
Ethias *C*	*[287]	Para. 144	-
Fortis *S/C/T/C*	Para. 94	-	-
Dexia (2010) *C*	-	Para. 70, 174, 212	-
Dexia (2012) *S/C/T/W*	Para. 224, 661 and 687	-	-

286. More information on the Restructuring Decisions can be found in the table in annex III. In that table, the Restructuring Decisions are highlighted (in **bold**).

287. A price leadership ban was *contemplated*. See para. 144.

Bank	Price leadership ban	Pricing restrictions	Ban on aggressive commercial practices
FIB *C*	-	-	Para. 124
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
CCB (2014) *C*	-	Para. 166	Para. 165
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
Amagerbanken *S/T/W*	-	Para. 59	-
Eik banki *S/T/W*	-	*[288]	-
Fionia bank *S/T/W*	-	Para. 31-34	-
Roskilde bank *S/T/W*	-	*[289]	-
FIH *C*	Para. 61, 137, annex point 5.3	-	Para. 61, 137
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
CIF *W*			

288. Pricing restrictions are not mentioned in the decision, but may follow from the commitments of the general scheme.
289. Para. 44 of the amendment decision.

Bank	Price leadership ban	Pricing restrictions	Ban on aggressive commercial practices
BayernLB *C*	-	-	-
Commerzbank *C*	Para. 71	-	-
HRE *C*	-	Para. 70, 93, 106, 129	-
HSH Nordbank *C*	-	-	-
IKB *C*	-	-	-
LBBW *C*	Para. 38	-	-
NordLB *C*	-	-	-
SachsenLB *T*	-	-	-
Sparkasse KolnBonn *C*	Annex point 5	-	-
WestLB	-	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
Alpha Bank *C*	-	Para. 303	Annex point 29
EFG Eurobank *C*	-	Para. 418	Annex point 29
Piraeus bank *C*	-	Para. 357	Annex point 29
National Bank of Greece *C*	-	Para. 408	Annex point 29
T Bank	-	-	Para. 47
TT Hellenic Postbank	*[290]	-	-
Nea Proton Bank	*[291]	-	-
ATE (2011) *C*	-	Para. 42	-
ATE (2013) *S/T/W*	-	-	-

290. A price leadership ban was *contemplated*.
291. A price leadership ban was *contemplated*.

Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
FHB *C*	-	-	Para. 92
MKB *C*	-	Para. 64	Para. 75, 126
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
Anglo/INBS *W*	-	-	-
AIB/EBS *C*	-	-	Annex point 5.2
BOI (2010) *C*	-	-	-
BOI (2011) *C*	-	-	-
IL&P (PTSB) *C*	-	-	Para. 96
Quinn Insurance *S/T/W*	-	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
MPS *C*	-	-	Para. 74, 156
BRC *C*	-	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
Parex banka *S/T/W*	-	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
LCCU *C*	-	-	-
AB Ukio Bankas *S/T/W*	-	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
Kaupthing Bank Luxembourg *S/T/W*	-	-	-

Bank	Price leadership ban	Pricing restrictions	Ban on aggressive commercial practices
ABN AMRO *C*	Article 3 of the decision	-	-
ING *C*	Para. 54, 150	-	-
SNS REAAL (2010) *C*	-	-	-
SNS REAAL (2013)	-	-	Para. 51, 99
Aegon *C*	Para. 69-72	-	-
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
CGD *C*	-	-	Para. 91
BPI *C*	-	-	Para. 94
BCP *C*	-	-	Para. 117
BPN *T*	-	-	-
BES *S/C/W*	-	Para. 81, 86	Para. 86
Banif *S/T/W*	-	-	Annex point 14
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
Abanka *C*	-	Para. 109, 114-115, 130	Para. 143
NKBM *C*	-	Para. 29, 104, 110, 124	Para. 139
NLB *C*	-	Para. 40, 128, 133, 144	Para. 158
Factor Banka *W*	-	Para. 62	Para. 34
Probanka *W*	-	Para. 63	Para. 35

Bank	Price leadership ban	Pricing restrictions	Ban on aggressive commercial practices
Catalunya Banc *C*	*	-	Para. 188
NCG Banco *C*	*	-	Para. 187
BFA *C*	*	-	Para. 215
Banco Mare Nostrum *C*	*	-	Para. 158
Liberbank *C*	-	-	Para. 140
Banco de Valencia *T*	-	-	-
Banco CAM *T*	-	-	Para. 67
UNNIM Banc *T*	-	-	-
Cajatres *T*	-	-	-
Banco Galleco *T*	-	-	-
CajaSur *T*	-	-	Para. 105
Caja Castilla-La Mancha *T*	-	-	Para. 82, 205
Banco CEISS *C*			
Bank	**Price leadership ban**	**Pricing restrictions**	**Ban on aggressive commercial practices**
LBG *C*	-	-	-
RBS *C*	-	-	-
B&B *S/T/W*	-	-	-
Northern Rock *S/C/W*	Para. 29, 161	-	-
Dunfermline *S/T/W*	-	-	-

Annex XII: Divestments

The following table indicates – for every bank State aid case – whether the Restructuring Decision[292] mentions that the case is characterised by i) a focus on core activities, ii) a sale of activities and iii) a balance sheet reduction. Since a balance sheet reduction is often related to the aid amount, the following table also indicates the aid amount (as a percentage of the bank's RWA).

The overarching theme is 'divestments'. Firstly, a focus on the core activities usually entails the divestment of non-core activities. Secondly, the sale of activities entails by definition a divestment. Thirdly, the balance sheet reduction can be achieved by a divestment of activities.

Bank	**Divestment of non-core activities (Pillar I)**	**Divestment as an own contribution (Pillar II)**	**Divestment as a compensatory measure (Pillar III)**	
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
OVAG *C*	Para. 107	Para. 113	3,8% (para. 79, 122)	67% (balance sheet) 71% (in terms of RWA) (para. 123)
BAWAG *C*	Para. 84	Not mentioned *[293]	Capital injection amounts to 2,4% of RWA (para. 77)	Not mentioned (although divestments are mentioned in para. 104)
Hypo Tirol Bank *C*	Para. 55	Para. 73	1,6%+4,25% (para. 12-15)	30%/39% (para. 78)
HGAA *S/C/W*	Not mentioned	Not mentioned	26% (para. 143)	85% (para. 152 and 58)
KA (2011) *S/C/W*	Not mentioned *[294]	Not mentioned	18,4% (para. 50, 94)	More than 60% (para. 96) *[295]
KA (2013) *W*	Not mentioned	Para. 82	Not mentioned	Not mentioned

292. The recitals mentioned in the table thus refer to recitals of the Restructuring Decisions. More information on the Restructuring Decisions can be found in the table in annex III. In that table, the Restructuring Decisions are highlighted (in **bold**).
293. See however: para. 104.
294. The strategic assets were transferred to KA Neu, while the non-strategic assets remained at KA Finanz.
295. Downsizing was also aimed at viability.

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
KBC *C*	Para. 147-148	Para. 163-164	4,1%/5,1% (para. 114, 115)	20%/17% (para. 172) *[296]
Ethias *C*	Para. 122	Para. 132	[11-15]% (para. 104)	38% (annex point 48) *[297]
Fortis *S/C/T/C*	Not mentioned	Para. 90	No percentage mentioned	Not mentioned (although para. 93 mentions the sale of Fortis Bank Nederland)
Dexia (2010) *C*	Para. 173	Para. 206	Para. 150, but only absolute amount, no percentage	35% (para. 62, 88, 173, 216)
Dexia (2012) *S/C/T/W*	Not mentioned	Para. 616	Para. 526-537, but only absolute amount, no percentage	[70-80]% (para. 76, 605) DBB/Belfius: 20% (para. 565, 585)
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
FIB *C*	Not mentioned *[298]	Not mentioned *[299] *[300]	Liquidity support; no percentage	*No balance sheet reduction. Justification in para. 80, 81 and 83.*
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
CCB/CCI (2014) *C*	Para. 59	Para. 149-150	13% (para. 150, 153)	10-12% *[301] (para. 156)
CCB/CCI (2015) *C*	Para. 50	Para. 109	2% (para. 113)	Not mentioned

296. NB: one divestment was specifically aimed at creating a new competitor.
297. NB: one divestment was specifically aimed at creating a new competitor.
298. Justification in para. 80, 81 and 83.
299. See previous footnote.
300. Justification in para. 80, 81 and 83.
301. The Commission accepted a relatively low level of downsizing. See para. 150 and 160-163.

	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
Amager-banken *S/T/W*	Not mentioned	Para. 127	Not mentioned	Not mentioned
Eik banki *S/T/W*	Not mentioned	Para. 57	Para. 21, but only absolute amount, no percentage	Not mentioned
Fionia Bank /T/W	Not mentioned	Para. 103-104	Not mentioned	"reduction of the economic activity to less than 40% of its former size" (para. 85)
Roskilde Bank *S/T/W*	Not mentioned	Not mentioned	Not mentioned	Not mentioned
FIH Holding *C*	Not mentioned	Not mentioned	Para. 103, but only absolute amount, no percentage	44% (para. 140)
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
CIF *W*	Not mentioned	Not mentioned	Not mentioned	Not mentioned

	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
BayernLB *C*	Para. 51	Para. 196	Capital assistance equivalent to 8% (para. 205)	51% (para. 206)
Commerzbank *C*	Para. 94-95	Para. 106	Not mentioned	45% (para. 46, 69, 112)
HRE *C*	Para. 95	Para. 118 and 120	20% (para. 88)	85% (para. 63, 127)
HSH Nordbank *C*	Para. 224	Para. 239	[2-10]%	61% (para. 58, 266)
IKB *C*	Para. 44, 62, 98	Para. 104-107	Para. 92, but only absolute amount, no percentage	47,2% para. 49, 111)
LBBW *C*	Para. 74	Para. 96	Para. 100, but only absolute amount, no percentage	41% (para. 102)
NordLB *C*	Para. 138	Para. 152	3,9% (para. 110)	15% (para. 165)
SachsenLB *T*	Para. 107-108	Para. 119	Not mentioned	51% (para. 119)
Sparkasse KolnBonn *C*	Para. 76	Para. 89	3,3% (para. 98)	[15-20]% (in terms of RWA) (para. 30, 97)
WestLB (2009) *C*	Para. 74	Para. 76-79	Para. 60, but only absolute amount, no percentage	50% (para. 84)
WestLB (2011) *W*	Not mentioned	Not mentioned	[24,4-27,6]% (para. 140-h)	"will disappear from the market" (para. 188)

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
Alpha Bank *C*	Para. 277-281	Para. 288-290	12% (para. 298)	No percentage mentioned (para. 299, 301)
Eurobank *C*	Para. 375-378	Para. 385-386	23,7% (para. 413)	No percentage mentioned (para. 414, 416)
Pireaus Bank *C*	Para. 334-337	Para. 344	23,7% / 19,4% (para. 352, ootnote 118)	No percentage mentioned (para. 353, 355)
National Bank of Greece *C*	Para. 384-388	Para. 394-395	17,3% / 15,6% (para. 403)	No percentage mentioned (para. 404, 406)
TT Hellenic Postbank *S/T/W*	Not mentioned	Not mentioned	Para. 260	"New TT Bank ceases to exist as an autonomous competitor that determines its policy on a stand-alone basis" (para. 262)
Nea Proton Bank *S/T/W*	Not mentioned	Not mentioned	Para. 223[302]	"Nea Proton Bank will not continue to exist as a stand-alone competitor" (para. 226)
ATE (2011) *C*	Not mentioned	Para. 80	8,3% (para. 55, 85)	25,7% (para. 86)
ATE (2013) *S/T/W*	Not mentioned	Not mentioned	Not mentioned	"ATE Bank will disappear in its prevailing form from the market" (para. 75)
Panellinia Bank *S/T/W*	Not mentioned	Not mentioned	Para. 36, but only absolute amount, no percentage	"will cease to exist as a stand-alone competitor" (para. 88)

302. Measures NP1 and NP2 represented more than 50% of Proton Bank's RWA or more than 130% of Nea Proton Bank's RWA. Measure NP3, corresponded to around 48.7% of the RWA of Nea Proton Bank.

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
FHB *C*	Para. 76 *[303]	*[304]	Not mentioned	*No structural measures (para. 91). Justification in para. 94.*
MKB *C*	Para. 61, 67	Para. 119	2,8% (para. 123)	Absolute amount, no percentage (para. 69, 124)
	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
Anglo/INBS *W*	Not mentioned	Para. 162	Anglo : 43,9% INBS : 59% (para. 118) See also para. 173	"the institutions will almost completely exit all the markets where they were present" (para. 174)
AIB/EBS *C*	Para. 107	Para. 123	Para. 98, but only absolute amount, no percentage	14% (para. 59 in the context of viability; see also para. 50[305])
Bank of Ireland (2010) *C*	Para. 184	Para. 214	[4-5]% (para. 176)	[20-30]% (para. 248) *[306]
Bank of Ireland (2011) *C*	Para. 130	Para. 166	4-5% RWA (para. 100)	[…]% (para. 178)
IL&P (PTSB) *C*	Para. 69	Para. 86	18% (para. 60)	Not mentioned
Quinn Insurance *S/T/W*	Not mentioned	Para. 145	Not mentioned	Not mentioned

303. "FHB has taken the necessary steps to significantly reduce its involvement in the mortgage bond market."
304. Justification in para. 94.
305. "The Bank has already implemented a wide range of restructuring measures before submitting the final version of the restructuring plan, with a view to achieving the aims of long-term viability, own contribution and burden sharing. Those measures comprise business divestments, asset deleveraging" (para. 50)
306. NB: one divestment was specifically aimed at creating a new competitor.

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
MPS *C*	Not mentioned	Para. 144	3,7% (para. 152)	20% (para. 155)
BRC *S/T/W*	Not mentioned	Not mentioned	29% of total assets (para. 65)	"BRC will cease to exist entirely as a stand-alone competitor" (para. 68)
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
Parex banka *S/C/W*	Para. 134	Para. 145	Para. 111, but only absolute amount, no percentage	60% (para. 152) *[307]
MLB *S/T/W*	Not mentioned	Not mentioned	Not mentioned	Not mentioned
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
LCCU *C*	*	*[308]	Para. 61, but only absolute amount, no percentage	*No restructuring, but there is a justification in para. 69*
AB Ukio Bankas *S/T/W*	Not mentioned	Not mentioned	71% of RWA of legacy business (para. 89)	80% (para. 93)

307. NB: one divestment was specifically aimed at creating a new competitor.
308. See para. 57: "the Commission finds that the restructuring process is adequate".

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
ING *C*	Not mentioned	Para. 135	5% (para. 141)	45% (para. 54, 82, 143) *[309]
ABN AMRO *C*	Not mentioned	Not mentioned	Para. 280	Not mentioned (although para. 323 mentions the divestment of new HBU)
SNS REAAL (2010) *C*	Para. 70	Not mentioned	Less than 2% (para. 67, 79)	20-25% of RWA (para. 80)
SNS REAAL (2013) *C*	Para. 79-80	Para. 94	7,8%/9,4% (para. 62)	Not explicitly mentioned in the compatibility-assessment
Aegon *C*	Not mentioned	Not mentioned	3,8% (para. 94)	6% (para. 121)
	Focus on core activities	***Sale of activities***	***Aid amount (%)***	***Balance sheet reduction (%)***
CGD *C*	Para. 22, 65	Para. 79	2,3% (para. 89)	[10-20]% (para. 22, 65)
BPI *C*	Para. 29-36	Not mentioned	6% (para. 92)	[20-30]% (para. 70)
BCP *C*	Para. 38-46	Para. 109	5,4% (para. 113)	[15-30]% (para. 45) [20-40]% including sale BCP Poland (para. 57)
BPN *T*	Not mentioned	Not mentioned	Para. 182, but only absolute amount, no percentage	Not really mentioned[310]
BES *S/C/W*	Not mentioned	Not mentioned	Not mentioned	Not really mentioned[311]
Banif *S/T/W*	Not mentioned	Not mentioned	Para. 115, but only absolute amount, no percentage	Not mentioned

309. NB: one divestment was specifically aimed at creating a new competitor.
310. "The retail banking business that will be taken over by BIC has a balance sheet of less than 35% of the balance sheet of BPN before its nationalisation." (para. 250; see also para. 195-198 and para. 226)
311. "The Bad Bank will gradually reduce its balance sheet and off- balance sheet exposure total by at least [20-30]% by […] and by additional [30-40]% by […]." (para. 79)

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
Abanka *C*	Para. 120-126	Not mentioned	[30-40]% (para. 150)	[…] (para. 150)
Abanka/ Banka Celje *C*	Para. 149-154	Not mentioned	18,3% (para. 177)	[20-30]% balance sheet [10-20]% RWA (para. 179)
NKBM *C*	Para. 113-119	Para. 138	[30-40]% (para. 144)	[…] (para. 119)
NLB *C*	Para. 136-138	Para. 157	20% (para. 92, 163)	[…] (para. 55)
Probanka *W*	Not mentioned	Not mentioned	Not mentioned	Gradual reduction of balance sheet (para. 24, 60)
Factor Banka *W*	Not mentioned	Not mentioned	Not mentioned	Gradual reduction of balance sheet (para. 23, 59)
	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
Catalunya Banc *C*	Para. 167-168	Para. 174e	32,3% (para. 123, 178)	[60-70]% in terms of RWA (para. 63, 180)
NCG Banco *C*	Para. 161-162	Para. 173	22,27% (para. 177)	[30-40]% (para. 181)
BFA *C*	Para. 191-192	Para. 201v	[20-30]%, para. 205 22%, para. 140	[40-50]% (para. 210)
BMN *C*	Para. 135-136	Para. 149	9,4% (para. 93, 153)	[40-50]% (para. 51, 155)
Liberbank *C*	Para. 123	Para. 131	4,06% (para. 82, 135)	[20-30]% (para. 137)
Banco de Valencia *T*	Not mentioned	Not mentioned	64,4% (para. 116, 189)	"disappearance of BVA as a standalone entity" (para. 190)

Banco CAM *T*	Not mentioned	Not mentioned	30-33% (para. 162)	"disappearance of CAM as a standalone entity" (para. 163)
UNNIM Banc *T*	Not mentioned	Not mentioned	24,8% (para. 120)	"disappearance of UNNIM Banc as a standalone entity" (para. 179)
Cajatres *T*	Not mentioned	Para. 154	8,6% (para. 94, 160)	Para. 164
Banco Galleco *T*	Not mentioned	Not mentioned	43,4% (para. 136)	"disappearance of Banco Gallego as a standalone entity" (para. 137)
CajaSur *T*	Not mentioned	Not mentioned	[…]% of CajaSur's RWA. (para. 99)	"exit of a failed entity" (para. 100)
Caja Castilla-La Mancha (CCM) *T*	Not mentioned	Not mentioned	51,7% (para. 197 and 136)	"exit of a failed entity" (para. 199) "significant downsizing of the banking activities transferred to Banco Liberta" (para. 203)
Banco CEISS (2012) *C*	Para. 143	Para. 154	7,8% (para. 101, 159)	[20-30]% (para. 163)
Banco CEISS (2013) *T*	Para. 101	Para. 112	7,8%/8,65%n (para. 118)	more than [20 – 30]% (para. 122)
Banco CEISS (2014) *T*	Para. 93	Para. 109	0,75% (para. 103, 115)	additional [10 – 20]% reduction in the balance sheet (para. 117)

	Focus on core activities	*Sale of activities*	*Aid amount (%)*	*Balance sheet reduction (%)*
LBG *C*	Para. 70-71	Para. 161	3%/4,1% (para. 178)	25% (para. 191) *[312]
RBS *C*	Para. 58	Para. 215	Between 11,3 and 19,6% (para. 234)	[above 20]% of total balance sheet and [above 40]% of funded balance sheet (para. 59, 250; see also footnote 37) *[313]
Northern Rock *S/C/W*	Not mentioned	Para. 144-145	Para. 40, 99-101	"The balance sheet will be less than [30-35]% of the original size of NR in 2007" (para. 156)
B&B *S/T/W*	Not mentioned	Not mentioned	Not mentioned	Not mentioned
Dunfermline *S/T/W*	Not mentioned	Para. 121	Not mentioned	"break-up of the former Dunfermline and the subsequent wind-down of 50% of its business" (para. 124-125)

312. NB: one divestment was specifically aimed at creating a new competitor.
313. NB: one divestment was specifically aimed at creating a new competitor.

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